No. 93-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

SECURITY PACIFIC AUTOMOTIVE FINANCIAL SERVICES CORP.,

Petitioner,

—v.—

BETTY LUNDQUIST, on behalf of herself and all others similarly situated,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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August 30, 1993

QUESTIONS PRESENTED

I. Can a United States Court of Appeals, consistent with the provisions of 28 U.S.C. § 1291 (1988) and Fed. R. Civ. P. 54(b), exercise appellate jurisdiction over a grant of partial summary judgment absent a determination by the District Court pursuant to Fed. R. Civ. P. 54(b) that there is no just reason for delay?

II. Does the Consumer Leasing Act of 1976, 15 U.S.C. §§ 1667–1667e, permit lessors to disclose the method by which early termination liability is calculated by reference to established accounting principles?

LIST OF PARTIES

Plaintiff below and Respondent to this Petition is Ms. Betty Lundquist, a resident of the State of Connecticut.

Petitioner and Defendant below is Security Pacific Automotive Financial Services Corp.* Appearing below as *amici curiae* on the Petition for Rehearing were the National Vehicle Leasing Association, the Consumer Bankers Association and the American Financial Services Association.

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* Pursuant to Supreme Court Rule 29.1, Petitioner hereby discloses that BankAmerica Financial, Inc. and BankAmerica Corporation are its parent companies. Petitioner has no non-wholly owned subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

Petitioner Security Pacific Automotive Financial Services Corp. ("Security Pacific") respectfully prays that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Second Circuit filed May 6, 1993.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Second Circuit is published at 993 F.2d 11 (2d Cir. 1993), and is reprinted in the accompanying Appendix to this Petition at pages 1a-12a. The unpublished opinion of the Magistrate Judge in the United States District Court for the District of Connecticut and the endorsement thereof by Hon. T.F. Gilroy Daly are reprinted in the Appendix to this Petition at pages 13a-17a.

JURISDICTION OF THIS COURT

The Second Circuit's decision in this case was entered on May 6, 1993. Security Pacific timely filed a Petition for Rehearing with the Suggestion of Rehearing *In Banc*, which was denied by the Second Circuit on July 22, 1993. The denial is reproduced in the Appendix to this Petition at pages 37a-38a. Jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1), which permits review by writ of certiorari before or after rendition of a judgment or decree by a United States court of appeals. This Petition for Certiorari is timely filed pursuant to Supreme Court Rule 13.

STATUTES, REGULATIONS AND RULES INVOLVED

The relevant provisions of Title 28 of the U.S. Code and Fed. R. Civ. P. 54 are set forth in the Appendix to this Petition at pages 124a-127a. The Consumer Leasing Act of 1976, Pub. L. No. 94-240, 90 Stat. 257 (1976), (codified at 15 U.S.C. §§ 1667–1667e), and Regulation M, the Federal Reserve Board regulations promulgated thereunder and codified at 12 C.F.R. §§ 213.1–213.8 (1993), are set forth in their entirety in the Appendix to this Petition at pages 66a-110a. The relevant provisions of the Connecticut Unfair Trade Practices Act,

Conn. Gen. Stat. §§ 42-110a–42-110q (1992), are reprinted at pages 111a-124a of the Appendix.

STATEMENT OF THE CASE

I. Initial Proceedings

Respondent Betty Lundquist ("Lundquist") sued Security Pacific in the United States District Court for the District of Connecticut alleging, *inter alia*, that her form automobile lease agreement for her lease of a Peugeot automobile (the "Lease") violated the Consumer Leasing Act of 1976, Pub. L. No. 94-240, 90 Stat. 257, amending the Truth in Lending Act, 15 U.S.C. §§ 1601–1667e (hereinafter the "Act"), and the Federal Reserve Board Regulations and Commentary promulgated thereunder, 12 C.F.R. §§ 213.1–213.8 (1993) (Regulation M) and 12 C.F.R. Pt. 213 Supp. I (1993). Specifically, Respondent alleged in Count I that charges imposed for early termination were "unreasonable" under the Act. In Count II, she alleged the improper disclosure of various provisions of the Lease in violation of the Act. In Count III, Respondent sought a declaratory judgment that the charge imposed for early termination of the Lease was an unenforceable penalty under state law. Count IV sought damages pursuant to the Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. §§ 42-110a–42-110q (1992) ("CUTPA"). Unlike her claims under the Act, Lundquist's state law claims sought to assess both compensatory and punitive damages. Respondent purported to assert all of her claims on behalf of a class consisting of all lessees who signed similar Security Pacific leases.

The district court's jurisdiction was based on 15 U.S.C. § 1640 (1988) (Consumer Leasing Act claims), 28 U.S.C. § 1331 (1988) (federal question), and 28 U.S.C. § 1367 (Supp. II 1990) (supplemental jurisdiction over state law claims). A copy of Lundquist's complaint is reproduced in the Appendix to this Petition at pages 41a-58a.

On January 15, 1992, Security Pacific moved to dismiss all counts of Lundquist's complaint. In an opinion dated June 9, 1992, United States Magistrate Judge Thomas P. Smith granted in part Security Pacific's motion.

On February 6, 1992, Respondent moved for partial summary judgment solely with respect to three issues under the Act raised in Count II of her Complaint: 1) that Security Pacific did not disclose the conditions under which Lundquist might terminate her Lease (Complaint, ¶ 34(a)); 2) that Security Pacific did not adequately disclose the termination fee or the method by which the termination fee is calculated (Complaint, ¶ 34(b) & (c)); and 3) that Security Pacific did not adequately disclose express warranties (Complaint, ¶ 34(e)).

On August 13, 1992, the Magistrate Judge issued an opinion granting Respondent's motion for partial summary judgment. Appendix at 13a-17a. The opinion states, as a matter of law and with little discussion and no legal citation, that Security Pacific did not adequately disclose the method by which it calculates the early termination fee. Because the Magistrate Judge found one violation of the Consumer Leasing Act, he did not reach the other two issues, stating instead that one violation of the Act was sufficient to allow the Respondent to prevail on all her disclosure claims under the Act. U.S. District Judge T.F. Gilroy Daly endorsed the Magistrate Judge's opinion over objection on October 7, 1992.

In a separate opinion dated June 9, 1992, the Magistrate Judge also denied class certification. On October 19, 1992 Judge Daly endorsed the Magistrate Judge's denial of class certification over objection.

Lundquist subsequently brought a motion before the district court seeking entry of judgment in the amount of $1,000 for statutory damages on her disclosure claims under the Act. Security Pacific did not object to the motion, which read:

> [i]n the event of certification [on appeal], defendant reserves the right to contest damages *and plaintiff reserves the right to pursue the class claims asserted in the complaint.*

Appendix at 39a (emphasis added). Respondent did not withdraw or dismiss her remaining claims under the Act or state statutory and common law, nor did she seek a certification pursuant to Fed. R. Civ. P. 54(b). The District Court granted Respondent's motion on November 12, 1992 and judgment entered on November 25, 1992.

Respondent subsequently filed a notice of appeal to the United States Court of Appeals for the Second Circuit, seeking to overturn the denial of class certification. Respondent asserted appellate jurisdiction pursuant to 28 U.S.C. § 1291. Security Pacific filed a cross-appeal contesting the district court's grant of partial summary judgment.

II. The Decision Below

At oral argument on April 5, 1993, a Panel[1] of the Second Circuit, raised *sua sponte* the issue of appellate jurisdiction, and questioned whether a final, appealable judgment had been rendered below. The transcript of the oral argument is set forth in its entirety in the Appendix to this Petition at pages 129a-144a.

On May 6, 1993, the Panel issued its written opinion holding that Security Pacific's form auto lease violates the Act and Regulation M by failing adequately to disclose the method by which the fee charged for early termination is calculated. The Panel's opinion contains only a cursory treatment of the issue, stating:

> We have made a *de novo* review . . . and we agree with the district court that the Security Pacific lease disclosures

[1] The Panel consisted of Judge Timbers, Judge McLaughlin (presiding), and Judge Wellford of the Sixth Circuit sitting by designation. The May 6, 1993 Opinion was rendered *per curiam*.

> are not reasonably understandable. They are "confusing, unduly complicated, and unnecessarily convoluted." In particular, the termination formula in Item 16(c) of the lease is a Byzantine formula, beyond the understanding of the average consumer.

Id., 993 F.2d at 15 (citations omitted). The Court also affirmed the denial of class certification. Despite the fact that the issue of appellate jurisdiction comprised the lion's share of the time allotted for oral argument, the Panel's opinion was silent on the issue of jurisdiction.

In response to the Panel's opinion, Security Pacific filed a Petition for Rehearing with the Suggestion of Rehearing *In Banc*.[2] Security Pacific's petition for rehearing argued that the Second Circuit lacked appellate jurisdiction for want of a final judgment below and that the Second Circuit misapplied the requirements of the Act and Regulation M.

On July 22, 1993, the Second Circuit denied the petition for rehearing. The Panel explained that it had:

> reconsidered the issue of appellate jurisdiction, and found that the district court had entered a final appealable order.

Appendix at 37a. Despite the fact that counsel for Petitioner stated at oral argument that the Respondent's motion for judgment below reserved her rights to assert her claims stated in Counts I, III and IV (*See* Appendix at 138a), the Panel also held that

> [Security Pacific] has not suggested any specific claims that remain to be decided by the district court and [Lundquist] has been granted her maximum relief. The entry of judgment thus vested the panel with jurisdiction.

Appendix at 37a-38a.

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[2] Security Pacific's time to file the Petition for Rehearing was extended on motion by the Second Circuit until June 10, 1993.

REASONS FOR GRANTING THE WRIT

I. THE SECOND CIRCUIT'S DECISION TO EXERCISE APPELLATE JURISDICTION OVER THIS ACTION IS IN CONFLICT WITH THE NINTH CIRCUIT RULE ANNOUNCED IN *CHENG V. COMMISSIONER OF INTERNAL REVENUE* AND REPRESENTS A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

At the threshold, the Second Circuit Panel correctly questioned whether its exercise of appellate jurisdiction over this action would be proper under federal law. As the Court recognized during oral argument, the district court below granted only partial summary judgment of claims asserted in a paragraph of one of several counts in the complaint. *See* Respondent's Motion for Partial Summary Judgment (Appendix at 145a-147a). At no time has Respondent withdrawn or moved to dismiss her remaining claims. However, without providing any explanation of its basis for exercising jurisdiction, the Panel decided to hear and determine Respondent's appeal and Petitioner's cross-appeal.

The Second Circuit's decision to exercise jurisdiction in the present case is directly in conflict with the Ninth Circuit rule announced in *Cheng v. Commissioner of Internal Revenue*, 878 F.2d 306 (9th Cir. 1989). Furthermore, the Panel's exercise of appellate jurisdiction over this action is contrary to 28 U.S.C. § 1291 and Fed. R. Civ. P. 54(b), and represents a clear departure from the accepted and usual course of judicial proceedings.

A. The Second Circuit's Exercise of Jurisdiction is in Conflict with the View of the Ninth Circuit

Lundquist received partial summary judgment in her favor only on some of her claims asserted under the Act in Count II of the Complaint. Her challenge under the Act to the reasonableness of the provisions of the Lease (Count I), her state law

claims for a declaratory judgment of unenforceability (Count III), and her claim for compensatory and punitive damages under CUTPA (Count IV) were not ruled upon by the district court and are still pending. Respondent's Motion for Judgment of Damages (Appendix at 39a), which the district court below granted on November 12, 1992, reads in pertinent part:

> [i]n the event of [reversal of the district court's denial of class] certification, defendant reserves the right to contest damages *and Plaintiff reserves the right to pursue the class claims asserted in the complaint.*

Appendix at 39a (emphasis added). Thus, Respondent's Motion for Judgment did not address resolution of the statutory and common law claims left undecided by the district court. Neither did Respondent request the district court to make a determination that there was "no just reason for delay" as required by Fed. R. Civ. P. 54(b). Nor did Respondent follow the procedures of 28 U.S.C. § 1292(b) (1988) for an interlocutory appeal. Despite this lack of finality, the Second Circuit Panel decided to hear this appeal and exercise jurisdiction over the grant of partial summary judgment absent a Rule 54(b) certification.

This decision to extend jurisdiction is in direct conflict with the Ninth Circuit's rule announced in *Cheng v. Commissioner of Internal Revenue*, 878 F.2d 306 (9th Cir. 1989). In *Cheng*, the Ninth Circuit faced a virtually identical procedural situation. There, after the Tax Court[3] below granted partial summary judgment in favor of the Commissioner of Internal Revenue, the parties entered into a joint stipulation purporting to permit the entry of an appealable final order. The stipulation provided, in pertinent part:

---

[3] Courts of Appeals have jurisdiction over decisions of the Tax Court "in the same manner and to the same extent as the decisions of the district courts in civil actions tried without a jury." 26 U.S.C. § 7482(a)(1) (1988).

> Petitioner wishes to appeal the Court's order granting Respondent's motion for partial summary judgment. The parties recognize that in the event that the Court's motion for partial summary judgment is reversed on appeal and the case remanded to the Tax Court the remaining issues may have to be tried before the Court. However, in order to permit the entry of a final appealable decision at this time and without in any way impairing the parties ability to litigate the remaining issues, the parties hereby stipulate that:
>
> [A final order] . . . may be entered by the Court upon the stipulation that Petitioner is not conceding the remaining undecided issues and should a decision be entered in favor of Petitioner on appeal and the case remanded to the Court, Petitioner will, on remand, be permitted to present additional evidence and arguments in support of his entitlement to deduct the losses in issue, including those not addressed in the motion for partial summary judgment.

878 F.2d at 308. The stipulated judgment thus allowed Mr. Cheng to retain his undecided claims and defenses in the event he prevailed on appeal.

The Ninth Circuit dismissed the appeal and held that no final judgment had entered and therefore appellate jurisdiction did not exist. The Court stated:

> It is axiomatic that orders granting partial summary judgment, because they do not dispose of all claims, are not final appealable orders under section 1291. . . .
>
> . . . In applying the finality requirement, however, the Supreme Court has described a final decision as a "decision by the District Court that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment,' " *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467, 98 S.Ct. 2454, 2457, 57 L.Ed.2d 351 (1978) (quoting *Catlin v. United States*, 324 U.S. 229, 233, 65

> S.Ct. 631, 633, 89 L.Ed. 911 (1945)) . . . . We interpret [this] standard to mean that an order must conclusively terminate the litigation in order to be considered final; an order that *may* terminate the proceeding is insufficient. Similarly, the requirement that all claims of error be raised in a single appeal is not satisfied if there is a *possibility* that more than one appeal will be filed. . . .
>
> . . .
>
> The Tax Court's order in this case, as a result of the parties' stipulation, does not conclusively end the litigation on the merits; review of the order will result in piecemeal review were we to reverse. Were we to entertain this appeal and reverse the Tax Court on the issue presently before us, it is not at all unlikely that the party that loses below would file an appeal on the waived issues.
>
> Allowing . . . separate appeals would also undermine one of the primary purposes underlying the final judgment rule—the efficient use of judicial resources. . . .
>
> That the litigation would be ended were we to find that we have jurisdiction and affirm the Tax Court is somewhat appealing. The probability of an additional appeal and an unnecessary decision on the issue in the present appeal were we to reverse the [lower court], however, counsels against construing the . . . order as final. To hold otherwise might also have a drastic impact on the effect of the final judgment rule. A plaintiff who has alleged several separate claims could conceivably appeal as many times as he has claims if he is willing to stipulate to the dismissal of the claims (contingent upon the affirmance of the lower court's judgment) the court has not yet considered.

Id., 878 F.2d at 309-11 (citations omitted). The Ninth Circuit has followed this holding consistently. *See, e.g.*, *United States v. Vaccaro*, 931 F.2d 605 (9th Cir. 1991) (dismissing appeal for

want of final appealable order below); *United States v. Morales*, 898 F.2d 99 (9th Cir. 1990) (same).

The Second Circuit's decision to hear Lundquist's appeal is directly contrary to the rule enunciated in *Cheng*. Although partial summary judgment on her disclosure claims under the Act has now been affirmed, Respondent remains free to pursue the state law claims in the pending litigation. Thus the decision below creates the type of lenient rule against which the *Cheng* court warned. The position taken in this action by the Second Circuit thus directly conflicts with the Ninth Circuit's view of appellate jurisdiction. The resulting imbalance must be resolved by this Court.

B. The Second Circuit Has Departed From the Accepted and Usual Course of Judicial Proceedings

In addition to creating a conflict among the circuits, the Panel's decision to exercise jurisdiction over this appeal is contrary to law and represents a clear departure from traditional concepts of federal appellate jurisdiction. Such circumstances mandate this Court's intervention.

Pursuant to 28 U.S.C. § 1291:

> [t]he courts of appeals . . . shall have jurisdiction of appeals from all *final* decisions of the district courts of the United States . . .

28 U.S.C. § 1291 (1988) (emphasis added). The Second Circuit has heretofore applied this rule consistently. *See, e.g., New York State Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1349 (2d Cir. 1989) ("[a]s a general rule, an appeal may be taken only from a final judgment"); *Hanlin v. Mitchelson*, 794 F.2d 834, 837 (2d Cir. 1986) (holding that district court's dismissal of complaint leaving counterclaim still pending is not an "appealable final judgment" under Fed. R. Civ. P. 54(b)).

This Court has long prohibited piecemeal disposition of litigation, requiring that an order dispose of all claims prior to appellate review. This requirement of finality

> . . . is in accordance with the sensible policy of "avoid[ing] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment."

Van Cauwenberghe v. Biard, 486 U.S. 517, 521, n.3 (1988) (quoting from *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981), quoting, in turn, from *Cobbledick v. United States*, 309 U.S. 323, 325 (1940) (Frankfurter, J.)). As Justice Rutledge stated in *Catlin v. United States*, 324 U.S. 229, 233-34 (1945):

> The foundation of this policy is not in merely technical conceptions of "finality." It is one against piecemeal litigation. "The case is not to be sent up in fragments. . . ." . . . Reasons other than conservation of judicial energy sustain the limitation. One is elimination of delays caused by interlocutory appeals.

Id. (citation omitted). *See generally*, 9 Moore's *Federal Practice* ¶ 110.07 (2d ed. 1993).

"The right to appeal and appellate jurisdiction are wholly creatures of statute." *United States v. Dior*, 671 F.2d 351, 354 (9th Cir. 1982). *See also City of Baton Rouge v. United States Envtl. Protection Agency*, 620 F.2d 478, 479 (5th Cir. 1980). Thus,

> appellate jurisdiction is something with which neither [the Court of Appeals] nor the parties to an appeal can endow the court. Its scope is constitutionally committed to the discretion of Congress and, out of respect for that balance, [a court must] not regard the convenience of the parties as

> a justification for blurring unnecessarily the lines Congress has drawn.

Township of Bansalem v. American Fidelity Fire Ins. Co., 644 F.2d 990, 994 n.6 (3d Cir. 1981). *See also Drake v. Gordon*, 848 F.2d 701 (6th Cir. 1988) (holding that agreement between parties cannot confer upon court of appeals jurisdiction to entertain an appeal from something other than a final order which deals with all issues between the parties).

Because it is clothed only with limited jurisdiction, a court of appeals is required to consider *on its own motion* whether Congress has given it authority to hear an appeal. *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 443 (D.C. Cir. 1990); *Schrader v. Commissioner of Internal Revenue*, 916 F.2d 361, 362 (6th Cir. 1990); *Shendock v. Director, Office of Workers' Compensation Programs*, 893 F.2d 1458, 1461-62 (3d Cir.), *cert. denied*, 498 U.S. 826 (1990); *In re Miscott Corp.*, 848 F.2d 1190, 1192 (11th Cir. 1988); *Unioil, Inc. v. E.F. Hutton & Co.*, 809 F.2d 548, 554 (9th Cir. 1986), *cert. denied*, 484 U.S. 822 (1987), and *cert. denied*, 484 U.S. 823 (1987); *Solano v. Beilby*, 761 F.2d 1369, 1370 (9th Cir. 1985); *Cason v. Owen*, 578 F.2d 572, 573 (5th Cir. 1978). If the court of appeals is without jurisdiction, the appeal must be dismissed. *In re Rini*, 782 F.2d 603, 606 (6th Cir. 1986); *State Fire & Cas. Co. v. Red Top Supermarkets, Inc.*, 304 F.2d 161, 162 (5th Cir. 1962).

The sole basis for this appeal is the district court's grant of partial summary judgment and entry of judgment thereon. That ruling clearly did not resolve all the issues raised below, specifically those raised in Counts I, III and IV, *i.e.*, the reasonableness under the Act of the charges at issue, the enforceability of the provisions under state common law, and the potential violations of CUTPA, with the possible imposition of punitive damages.

Despite the fact that Security Pacific presented this argument in its petition for rehearing, and that these issues remain below,

the Second Circuit Panel apparently disregarded the existence of Respondent's CUTPA and state law claims, stating instead that Petitioner failed to suggest any specific claims remaining below and that Lundquist received her maximum relief. *See Complaint*, Counts III and IV (Appendix at 56a-57a). However, Lundquist's state-law claims raise the possibility of punitive damages, and Respondent accordingly has not received all the relief to which she may be entitled if she prevails on all her claims. Even the Panel acknowledged that only *partial* summary judgment had entered below. *See Opinion*, 993 F.2d at 14.

Neither has the Respondent complied with the requirements of Fed. R. Civ. P. 54(b), which provides:

> **(b) Judgment Upon Multiple Claims or Involving Multiple Parties.** When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. *In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action* as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Fed. R. Civ. P. 54(b) (emphasis added).

The court's endorsement of Lundquist's Motion for Judgment and the judgment form completed by the Clerk of the Court (Appendix at 36a-38a) contain no language even suggesting that there is "no just reason for delay" or that the judgment was intended to dispose of all claims. Thus, the judgment

of the district court is not "final" for purposes of appeal under any reading of Rule 54(b). Nor has Respondent complied with the provisions of 28 U.S.C. § 1292(b).

Because Respondent's CUTPA and state common-law claims remain, there has been no final order entered, and this appeal was not properly before the Second Circuit. The Second Circuit's decision to hear this action rather than dismiss the appeal was contrary to the explicit rule of this Court prohibiting piecemeal appellate review. Even under a liberal reading of the statutes or rules, the Second Circuit's exercise of jurisdiction was a clear departure from the usual course of judicial proceedings. This Court should exercise its supervisory powers over the Second Circuit, grant certiorari, and dismiss the appeal.

II. WHETHER THE CONSUMER LEASING ACT AND REGULATION M PERMIT LESSORS TO DISCLOSE EARLY TERMINATION LIABILITY BY REFERENCE TO ESTABLISHED ACCOUNTING PRINCIPLES IS AN IMPORTANT QUESTION OF LAW WHICH HAS NOT BEEN, BUT SHOULD BE, RESOLVED BY THIS COURT.

The clause invalidated by the Second Circuit opinion, which describes the calculation of the penalty for early termination, is an important functional part of the Lease. Early termination can occur voluntarily at the lessee's option or by default. In either case, some adjustment payment is usually necessary because the lease payments have been calculated to depreciate the vehicle to a schedule related to the length of the lease term. As a result, where termination occurs prior to the expiration of the lease term, lessors typically, as here, require the lessee to pay the difference between the depreciated value of the vehicle at the time of termination and market value.

Security Pacific's disclosure of its early termination charge is quoted in the Panel's opinion at pp. 3-4 and reprinted in the Appendix to this Petition at 148a-150a. Item 16 of the lease

states that upon early termination a lessee will pay (a) $250; plus (b) any overdue lease payments; plus (c) "the amount, if any, by which the sum of the Adjusted Lease Balance as described in Item 8, plus one Base Payment, Item 3.A., exceeds the Realized Value, as determined in accordance with Item 15"; plus (d) any taxes due. Item 8 provides that the Adjusted Lease Balance is: (a) $18,780 less (b) the sum of (1) all depreciation amounts (calculated on a "constant yield" basis) plus (2) one Base Payment, Item 3.A.

A. The Potential Impact of the Second Circuit's Decision on the Leasing Industry is Enormous

The formulation described above is extremely common in the automobile leasing industry. If the Panel's decision is let stand, it would potentially result in invalidation of the early termination provisions of the majority of the nation's outstanding automobile leases.

Respondent has asserted that approximately 26 percent of all new cars are leased rather than purchased by consumers. *UPI Dispatch*, June 19, 1989. As set forth in the Affidavit of J. David Freeman, President of Security Pacific Automotive Financial Services Corp., sworn to on June 9, 1993 and submitted together with Security Pacific's Petition for Rehearing below at ¶ 3, over eleven thousand of Petitioner's leases contain the invalidated language, and over *one million* leases currently in effect nationwide have disclosure provisions identical or functionally equivalent to the Security Pacific disclosure here at issue. Appendix at 168a.

The reason why lessors choose the type of formulation contained in the disclosure at issue here is clear: the complex nature of the proper assessment for early termination, including the determination of depreciation, by its very nature defies any attempt to set forth exact figures at the inception of a lease. In recognition of this fact, the Consumer Leasing Act and Regulation M both provide that a lessor may disclose the *method* of

calculating early termination fees rather than a sum certain. Thus, the disclosure states that the depreciation will be calculated using the "constant yield" method. The language used herein by Security Pacific—and by the overwhelming majority of other lessors—properly balances the complex nature of the transaction with the need to explain the underlying liability to the consumer.

Yet the Panel's decision fails to consider these complexities, or the fact that disclosure provisions such as Security Pacific's routinely have been upheld. By invalidating the disclosure provision without providing any guidance or discussion as to a proper construction, the Panel's brief treatment of the Consumer Leasing Act threatens to wreak havoc in the industry by fostering a multitude of suits aimed at invalidating hundreds of thousands of leases. Such a situation demands resolution by the Supreme Court.

B. The Lease Disclosure is Adequate Under Existing Law

Although both the Magistrate Judge's opinion and the Second Circuit's *per curiam* opinion refer specifically to subparagraph (c) of Item 16, it is difficult, if not impossible, to understand from either opinion what exactly is inadequate about Item 16(c)—whether it is the wording of the provision itself or the reference to the "constant yield" method of determining depreciation as incorporated by reference to Item 8. Item 16(c) is itself absolutely clear: take the Adjusted Lease Balance, add one Base Payment, and subtract the Realized Value. The adjusted lease balance is $18,780 (in this case), minus depreciation, plus one Base Payment. Thus, the only undefined term in the entire disclosure is the exact amount of depreciation.

Rather than trying to disclose an exact figure for depreciation, Security Pacific chose to exercise its option under the Act

to disclose the *method* of calculating it. The way in which this is done is fully compliant with the Act and Regulation M.

In the course of invalidating this provision, the Panel failed to analyze the relevant precedent and mistakenly evaluated Security Pacific's disclosure in a legal vacuum. In contrast to the Panel's opinion, courts have held consistently that reference by name to established accounting principles—as Security Pacific has done here by referring to the constant yield method—complies with the disclosure requirements of the Act and Regulation M.

The leading case on this topic is *Kedziora v. Citicorp Nat'l Servs., Inc.*, 780 F. Supp. 516 (N.D. Ill. 1991), where Senior District Judge Milton I. Shadur rejected a nearly identical claim proffered by two of the three attorneys representing Ms. Lundquist in this action. In that case, the Citicorp lease disclosed the early termination charge by reference to the "Rule of 78s." The Court found that such disclosure is *per se* adequate, and that any further expansion of the Rule "will not help the consumer make useful comparisons among competing lease options." *Id.* at 530. The opinion continues by echoing the sentiment expressed by this Court:

> [p]erhaps [a lease] could be made clearer if it were made longer—if every cross-reference were replaced by repetition of the matter covered, and if every significant term and contingency were spelled out in detail. But the [Consumer Leasing] Act certainly does not require the lessor to take such steps, and no doubt if the lessor did some plaintiffs' lawyer would argue (with justification) that the lessor had burdened the consumer with "informational overload" in violation of the Supreme Court's warning in [*Ford Motor Credit Co. v. Millholin*, 444 U.S. 555 (1980)].

Id. at 529.

The *Kedziora* holding was reaffirmed by the same district court in *Wesley v. General Motors Acceptance Corp.*, 91-C-3368, 1992 WL 281325 (N.D. Ill. Oct. 6, 1992) (reproduced in the Appendix at pages 151a-162a) (approving reference to the "sum-of-the-monthly-balances" method), and has been affirmed by courts in other jurisdictions as well. *See Blank & Corrone v. Sun Hyundai*, No. 91-L-11124, slip op. (Ill. Cir. Ct. July 6, 1992) (reproduced in the Appendix a pages 163a-165a) (approving reference to the "constant yield method"—the identical method referenced in Lundquist's lease); *Wilson v. World Omni Leasing, Inc.*, 540 So.2d 713 (Ala. 1989) (approving reference to the "Rule of 78s").

The Federal Reserve Board has also approved disclosure by reference to established accounting principles. The predecessor to Regulation M, Regulation Z, contained a provision analogous to § 1667a(11) that required creditors to identify "the *method* of computing any unearned . . . finance charge in the event of prepayment in full of an obligation which includes precomputed finance charges. . . . " Former 12 C.F.R. § 226.8(b)(7) (1981) (emphasis added). In an official staff interpretation of this provision, the Federal Reserve Board stated that "the requirement of rebate 'identification' is satisfied simply by reference by name to the 'Rule of 78s' or other method as applicable."[4] 12 C.F.R. § 226.818(c) (1981). The policy underlying this interpretation, which the Board explained as follows, is equally applicable to lease disclosures:

---

[4] This official staff interpretation was rescinded in 1982 when Regulation Z was amended in connection with the passage of the Truth in Lending Simplification and Reform Act, 12 C.F.R. Supp. I, Introduction ¶ 3 at 287. Although there is no counterpart to this disclosure requirement in the current version of Regulation Z, numerous federal and state courts have concluded that merely identifying the rebate method (*e.g.*, "Rule of 78s") by name is sufficient. *See Kramer v. Midland Bank*, 559 F. Supp. 273, 280 (S.D.N.Y. 1983); *Nesbitt v. Blazer Fin. Servs., Inc.*, 550 F. Supp. 819, 825 n.4 (N.D. Ill. 1982); *Drennan v. Security Pac. Nat'l Bank*, 170 Cal. Rptr. 904, 907-10 (Cal. 1981), *cert. denied*, 454 U.S. 833 (1981); *Beneficial Discount Co. v. Johnson*, 211 S.E.2d 571, 573-76 (Va. 1975).

> [R]ebates of unearned finance charges . . . involve complex mathematical descriptions which generally cannot be condensed into simple accurate statements, and which if repeated at length on disclosure forms could detract from other important disclosures . . . .

Id. Although Regulation Z no longer contains this disclosure requirement, the *Kedziora* Court found "the logic of the former commentary still compelling, even though it no longer has an official anchorage." 780 F. Supp. at 530.

Accordingly, all that the Act requires is an identification by name of the method used by the lessor for calculating the accrued depreciation. This Security Pacific has done in its straightforward reference to the "constant yield method."

Viewed in legal context, Security Pacific's lease disclosure provision is the duplicate or functional equivalent of the disclosures approved by Courts and the Federal Reserve Board and found to be fully compliant with the Act.

C. The Panel Ignored the Fact That Calculation of the Early Termination Charge is Simple

Item 16(c) of the Lease (Appendix at 148a) is essentially an equation: A + B - C. "A" is the Adjusted Lease Balance (defined in Item 8); "B" is the Base Payment, which is defined as $227.29 in Item 3.A.; and "C" is the Realized Value. Because the Realized Value is set by agreement, appraisal or bids for repurchase at the time of termination, it cannot be predetermined but is entirely understandable. *See* Item 15.

As stated at oral argument below, a lessee can also easily determine the approximate amount of the Adjusted Lease Balance by following the recital contained in the lease and applying the figures set forth therein. Item 8 states that the Adjusted Lease Balance at any time is equal to $18,780 less the sum of 1) depreciation; and 2) one Base Payment ($227.29). Item 8 also states that "[p]ortions of each monthly payment are for depreciation, lease charge, and sales/use tax." Item 3.D pro-

vides that the monthly lease payment is $289.22. *See* Appendix at 150a. Item 8 states that the average monthly lease charge is $102.24. Item 3.B provides that the monthly sales/use tax is $11.93. Thus, the average monthly depreciation is the total monthly payment ($289.22) less the average monthly lease charge ($102.24) less taxes ($11.93), or $175.05. To obtain a substantially accurate approximation of depreciation paid at any point, the consumer need only multiply this number, $175.05, times the number of lease payments to date. The rest of the calculation for the Adjusted Lease Balance is simple.

As a result, determining the approximate sum for Item 16(c) requires only that a lessee read the lease and perform a calculation on the back of an envelope. While precise calculation of the exact amount due requires application of the constant yield method, as disclosed by the lease, a close approximation is readily available to the consumer. Contrary to the Panel's cursory conclusion, this formula is not "Byzantine" but is concise, straightforward and fair.

CONCLUSION

The two issues raised in this Petition mandate the intervention of this Court. In order to resolve a significant conflict between the Ninth and Second Circuits, and in order to determine an important issue of federal consumer law, Petitioner Security Pacific respectfully requests this Court issue a writ of certiorari to the United States Court of Appeals for the Second Circuit, and review the decision below.

Respectfully submitted,

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August 30, 1993

APPENDIX

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1323 & 1767—August Term, 1992

(Argued: April 5, 1993 Decided: May 6, 1993)

Docket Nos. 92-9288 & 92-9362

BETTY LUNDQUIST, on behalf of herself & all others similarly situated,

Plaintiff-Appellant-Cross-Appellee,

—v.—

SECURITY PACIFIC AUTOMOTIVE FINANCIAL SERVICES CORP.,

Defendant-Appellee-Cross-Appellant.

Before:

TIMBERS, MCLAUGHLIN, and WELLFORD,*

Circuit Judges.

---

* Honorable Charles W. Wellford, United States Court of Appeals for the Sixth Circuit, sitting by designation.

Appeal from judgment of the United States District Court for the District of Connecticut (T. F. Gilroy Daly, *Judge*) denying plaintiff's motion for class certification, and cross-appeal from same judgment granting plaintiff's motion for partial summary judgment.

AFFIRMED.

Judge Wellford concurs in a separate opinion.

JOANNE S. FAULKNER, New Haven, CT (Daniel A. Edelman, Cathleen Combs, James Eric Vander Arend, Law Offices of Daniel A. Edelman, Chicago, IL, of counsel), *for Plaintiff-Appellant-Cross-Appellee.*

CHARLES T. LEE, Stamford, CT (Alejandro Díaz, Paul, Hastings, Janofsky & Walker, Stamford, CT, of counsel), *for Defendant-Appellee-Cross-Appellant.*

PER CURIAM:

Betty Lundquist ("Lundquist") appeals from a judgment of the United States Court for the District of Connecticut (T. F. Gilroy Daly, *Judge*) denying her motion for class certification in an action against Security Pacific Automotive Financial Services Corp. ("Security Pacific"). She sued Security Pacific alleging that a form automobile lease agreement which she signed violated the Consumer Leasing Act, 15 U.S.C. §§ 1667-1667e (1988) ("CLA"),

and implementing regulations, 12 C.F.R. §§ 213.1-213.8 (1992) ("Regulation M"), as well as applicable state law. Security Pacific cross-appeals from the same judgment granting Lundquist's motion for partial summary judgment, in which the district court found that Security Pacific's disclosures in its form lease violated the CLA. For the reasons set forth below, we affirm.

In June 1988 Lundquist leased a Peugeot from Security Pacific, for a term of five years. She received a disclosure document stating that she had "no right to terminate this lease prior to the scheduled end of its term." If Lundquist chose to violate the lease by returning the car and making no more payments, she would be in default and liable according to the following provision:

> **16. EARLY TERMINATION LIABILITY**
>
> At any time after I [the lessee] sign this lease, you [Security Pacific] may terminate it if any of the conditions described in Item 22 occur or this lease is in default as described in Item 23.
>
> I agree that my payment liability upon early termination will be the sum of:
>
> (a) A termination fee of $250; plus
>
> (b) Any monthly lease payments already due you which are unpaid and any other amounts arising from my failure to keep my promises under this lease; plus
>
> (c) The amount, if any, by which the sum of the Adjusted Lease Balance as described in Item 8, plus one Base Payment, Item 3.A., exceeds the Realized Value, as determined in accordance with Item 15; plus

(d) Any official fees and taxes imposed in connection with lease termination (for example, sales/use taxes due on a deficiency balance under (c)).

Item 8, referred to in Item 16, states:

8. ALLOCATION OF MONTHLY LEASE PAYMENTS

Portions of each monthly lease payment are for depreciation, lease charge and sales/use tax. While the total amount of each monthly lease payment will be the same (assuming that current sales/use tax rates, if applicable, do not change), the depreciation and lease charge portions will differ with each payment. During the lease term you will earn a total of lease charges equal to the product of the number of monthly lease payments, due under the lease times *$102.24*, the average monthly lease charge. The lease charges will be earned by you on a constant yield basis in relation to the Adjusted Lease Balance as it declines during the lease term. The lease charge portion for any monthly lease payment is figured by multiplying the rate which provides a constant yield throughout the lease term times the Adjusted Lease Balance. Again, the portion of the monthly payment not allocated to lease charges or sales/use tax will be allocated to depreciation. (These calculations will follow the rule for journal entries for lessors as to direct financing leases obtained in Statement of Financial Accounting Standards No. 13.)

At any given time the Adjusted Lease Balance is:

(a) $18,780.00 less (b) the sum of (1) all depreciation amounts received by you to date plus (2) one Base Payment, Item 3.A.

Item 15 provides as follows:

15. VEHICLE VALUATION AT EARLY TERMINATION

My termination liability in the event of early termination will be affected by the Realized Value of the vehicle. The Realized Value may be determined in one of the following ways:

(a) Within ten (10) days after I return the vehicle, you and I may enter into a written agreement as to the vehicle's value, should I request it, or I may obtain a professional appraisal of the wholesale value of the vehicle made by a qualified person I find, who is acceptable to you as well as to me. I agree that the expense of any such appraisal will be mine.

(b) If the Realized Value is not determined as above within ten (10) days after return of the vehicle, you will attempt to obtain three bids to purchase the vehicle at wholesale for cash or may establish the Realized Value in some other commercially reasonable manner. I will have the right to submit a written bid which you agree to consider together with all other bids you may receive. Even though you may decide not to sell the vehicle to any bidder, the highest bona fide bid received (which is supported by whatever proof of ability to pay you may require) will be considered the vehicle's Realized Value.

I understand and agree that the Realized Value amount will be exclusive of any official fees and taxes imposed upon the disposition of the vehicle.

Some time after leasing the Peugeot, Lundquist called Security Pacific to inquire about terminating the lease. She was told it would require a substantial payment. She then sued Security Pacific, alleging that the form automobile lease agreement (1) failed to comply with the disclosure and reasonableness requirements of the CLA and Regulation M; (2) imposed unreasonable termination penalties, in violation of the substantive requirements of the CLA; and (3) violated state common law and "unfair and deceptive acts and practices" statutes.

Along with her complaint, Lundquist moved for class certification. She sought to represent a class that she defined as "all persons who signed leases with Security Pacific Automotive Financial Services Corporation using forms similar to [her own] . . . which leases do not have the three boxes at the end labelled 'corporation,' 'partnership' and 'sole proprietor' checked."

In June 1992 Magistrate Judge Smith (1) denied most of Security Pacific's motion to dismiss Lundquist's complaint, as relevant here, and (2) declined to the certify the class. In denying the motion for class certification, the Magistrate held that Lundquist failed to satisfy the commonality and typicality requirements of Fed. R. Civ. P. 23(a) (rev. ed. 1991) and the need requirement of Rule 23(b). He also noted that class certification in this case would needlessly strain the District of Connecticut's already limited judicial resources. Judge Daly adopted the recommendation on class certification, over Lundquist's objection.

In August 1992 Magistrate Judge Smith granted Lundquist's motion for partial summary judgment, holding that the "Early Termination Liability" provisions of Security Pacific's form lease were neither "reasonably

understandable" nor "clear" to the average consumer and thus violated the disclosure requirements of the CLA. Judge Daly adopted the Magistrate's opinion, over Security Pacific's objection, and entered judgment in favor of Lundquist for $1,000 (plus attorney fees and costs), the maximum amount of statutory damages she was entitled to recover under 15 U.S.C. 1640(a)(2)(A)(ii) (1988).

Lundquist now appeals, contending that the district court's reasons for denying class certification lack a valid legal or factual basis. On cross-appeal, Security Pacific argues that the disclosure complies with the requirements of the CLA. We reject both of these arguments.

I. The Appeal

"Provided that the district court has applied the proper legal standards in deciding whether to certify a class, its decision may only be overturned if it constitutes an abuse of discretion." *Johnpoll v. Thornburgh*, 898 F.2d 849, 852 (2d Cir.) (per curiam) (citing *Adamson v. Bowen*, 855 F.2d 668, 675 (10th Cir. 1988)), *cert. denied*, 498 U.S. 819 (1990). Although we are noticeably less deferential to the district court when that court has denied class status than when it has certified a class, *see Robidoux v. Celani*, No. 92-7709, 1993 WL 64467, at *3 (2d Cir. March 10, 1993) (citing *Abrams v. Interco, Inc.*, 719 F.2d 23, 28 (2d Cir. 1983)), we conclude that the district court did not abuse its discretion in finding that Lundquist defined the class too broadly to meet the (a)(2) commonality and the (a)(3) typicality requirements. *See McCarthy v. PNC Credit Corp.*, Civil No. H-91-854, slip. op. at 4 (D. Conn. May 27, 1992) ("Plaintiff offers no indication that members of the class defaulted under similar circumstances; whether

they incurred excess mileage charges; or were in some other way harmed by the alleged illegality of the lease form in question.").

We are aware that the district court "is not bound by the class definition proposed in the complaint and should not dismiss the action simply because the complaint seeks to define the class too broadly," *Robidoux*, 1993 WL 64467, at *5 (citing 7B Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice and Procedure* § 1790, at 270-71 (1986)). And we also recognize that the court is empowered under Rule 23(c)(4) to carve out an appropriate class—including the construction of subclasses. *See* Wright, Miller & Kane, *supra*, at 269-71. The court, however, is not obligated to implement Rule 23(c)(4) on its own initiative. *See United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 408 (1980) (it is plaintiff's burden to show how the action may be subclassed to avoid certification problems and "[t]he court has no *sua sponte* obligation so to act"). Thus, the district court's refusal to shoulder what, in the final analysis, is plaintiff's burden cannot be regarded in this case as an abuse of discretion.

II. The Cross-Appeal

Under the CLA and Regulation M, disclosures on a consumer lease must be made "accurately and in a clear and conspicuous manner," 15 U.S.C. § 1667a, "in meaningful sequence," 12 C.F.R. § 213.4(a)(1), and in "a reasonably understandable form," 12 C.F.R. pt. 213, supp. I, § 213.4(a)(1) (official staff commentary). We have made a *de novo* review, *see Gnazzo v. G.D. Searle & Co.*, 973 F.2d 136, 138 (2d Cir. 1992), and we agree with the district court that the Security Pacific lease disclosures are not reasonably understandable. They are "confusing,

unduly complicated, and unnecessarily convoluted." In particular, the termination formula in Item 16(c) of the lease is a Byzantine formula, beyond the understanding of the average consumer. Thus, partial summary judgment for Lundquist was appropriate.

We have considered all other arguments on appeal and on cross-appeal, and have found them to be without merit. The judgment of the district court is affirmed.

WELLFORD, *Senior Circuit Judge*, concurring:

The majority does not require the district court to narrow the class requested by the plaintiff, holding that it is plaintiff's burden to define an appropriate class.

In *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 407-08 (1980), the Supreme Court refused to impose a duty upon the district court to construct subclasses under Rule 23(c)(4), holding that burden is on the plaintiff to submit proposals to the court. "The court has no *sua sponte* obligation to act." *Id.*

Wright, Miller & Kane, 7b *Federal Practice and Procedure*: Civil 2d § 1790, however, explained that the court **may** act *sua sponte* to create subclasses:

> In addition to the court's powers under Rule 23(c)(4), plaintiff, when he initiates the litigation, may identify issues that should be given class treatment. . . . Of course, the court is not bound by plaintiff's complaint and should not dismiss the action simply because it misdefines the class or the issues when the court can correct the situation under Rule 23(c)(4).

Id. The burden is on the plaintiff to show that class requirements are met and "thus how the action may be subclassed to avoid certification problems." *Id.* at 271.

In the case at hand, the magistrate judge refused to narrow the class for the plaintiff/representative despite reviewing cases which defined similar, but more narrow, classes. In my view, the district court should have given the plaintiff an opportunity to narrow her class if that were the only problem with the certification of that class.

Several notices of class action and cases existed with more narrow but similar classes defined which might have guided the magistrate judge. *See Kedziora v. Citicorp Nat'l Serv., Inc.*, No. 91-C-3428 (N.D. Ill. Dec. 31, 1992); *Simon v. World Omni Leasing, Inc.*, 1992 WL 447370 (S.D. Ala. Dec. 3, 1992); *Wesley v. General Motors Acceptance Corp.*, 1992 WL 112244 (N.D. Ill. May 20, 1992); *Calkins v. Blum*, 511 F. Supp. 1073 (N.D. N.Y. 1981), *aff'd*, 675 F.2d 44 (2d Cir. 1982); *Perry v. Beneficial Fin. Co.*, 81 F.R.D. 490 (W.D. N.Y. 1979).

Simon v. World Omni Leasing, Inc., 1992 WL 447370 (S.D. Ala. Dec. 3, 1992), dealing with a similar Truth in Lending situation, certified a class of anyone "who signed contracts with [the defendant] using forms with disclosure statements identical to that in Exhibit A to the complaint and who leased those vehicles for personal use" and who are not precluded by the one year statute of limitations.

Wesley v. General Motors Acceptance Corp., 1992 WL 112244 (N.D. Ill. May 20, 1992), also a similar case, certified the following class:

> All natural persons who (a) leased a car from GMAC primarily for personal, family, or household purposes; (b) signed a lease agreement using form num-

> bers 671-DLP and 671-DLP-A, for a duration exceeding four months, and for a total lease obligation not exceeding $25,000; (c) signed their lease agreements in Illinois; (d) terminated . . . their leases on or after April 26, 1990 but before the scheduled termination of their leases; (e) were assessed an early termination or default deficiency based on a formula using the sum of the monthly balances for calculation of unearned lease charges.

Kedziora v. Citicorp Nat'l Serv., Inc., No. 91-C-3428 (N.D. Ill. Dec. 31, 1992), approved the following notice of class action to all persons who:

> (a) entered into a car lease (1) covering a lease period of more than four months and (2) providing for obligations on the part of the lessees (the persons leasing the cars) of not more than $25,000 per car and (3) having early termination provisions that were the same as those in the lease that is attached to the complaint in this case as Exhibit A; (c) terminated their leases . . . before the leases were originally scheduled to terminate, but in any event after May 6, 1990, and then returned their cars or else the insurance proceeds . . . to CNS; and (d) were assessed by CNS for a deficiency based on early termination of, or defaults on, their leases.

Perry v. Beneficial Fin. Co., 81 F.R.D. 490 (W.D. N.Y. 1979), certified a class of persons to whom defendant made loans during a specified period. The court, however, limited the class to those who obtained loans within the one year statute of limitations of the Truth in Lending Act. *See also Calkins v. Blum*, 511 F. Supp. 1073 (N.D. N.Y. 1981), *aff'd*, 675 F.2d 44 (2d Cir. 1982) (a narrow

subclass defined by the court in a non-Truth in Lending Act case).

The district court or the magistrate judge might well have narrowed the requested class or defined an acceptable subclass. The fact that this was not done *sua sponte* does not constitute an abuse of discretion. I, therefore, concur despite some reservations.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

CIV. NO. 5:91-754(TFGD)

BETTY LUNDQUIST,

Plaintiff,

—v.—

SECURITY PACIFIC AUTOMOTIVE FINANCIAL SERVICES CORPORATION,

Defendant.

MAGISTRATE'S OPINION

On or about June 11, 1988, plaintiff Betty Lundquist, as lessee, entered into a certain Vehicle Lease Agreement Closed End (the "lease") , with Hyde Park Motor Co., Inc., an automobile dealer in Rinebeck, New York, as lessor, for the lease of a 1988 Peugeot 505DL. Hyde Park Motor Co., Inc., assigned its interest in the lease to Security Pacific Automotive Financial Services Corporation ("Security Automotive") the same day. Pursuant to the terms of the lease, Ms. Lundquist agreed to make monthly lease payments to Security Automotive for a term of sixty months. At the end of the lease term, the plaintiff had an option to purchase the automobile outright. Ms. Lundquist took possession of the Vehicle on or about June 11, 1988.

By Complaint filed November 14, 1991, the plaintiff brought this action against Security Automotive alleging various state law claims cognizable under diversity jurisdiction, 28 U.S.C. § 1332, and multiple violations of the Consumer Leasing Act, 15 U.S.C. § 1667 *et seq.*

By this motion for partial summary judgment, plaintiff seeks a judgment on three of her federal statutory claims: (i) that

Security Automotive did not adequately disclose under what conditions the lessee may voluntarily terminate the lease; (ii) that Security Automotive did not adequately disclose its method of calculating termination charges; and (iii) that Security Automotive did not adequately disclose express warranties. This opinion addresses only item (ii) above.

Security Automotive does not contest plaintiff's Statement of Material Facts, ¶¶ 1 through 5 and 7. That statement establishes that:

1. Security Automotive was regularly engaged in the business of leasing and offering to lease vehicles to natural persons for a period of time exceeding four months, and for a total contractual obligation not exceeding $25,000, primarily for personal, family or household purposes.

2. On June 10, 1988, plaintiff Betty Lundquist signed a "Vehicle Lease Agreement Closed End" with Security Automotive, covering a 1988 Peugeot. A true and accurate copy of this document is attached as Exhibit 1 to the complaint and Exhibit F to plaintiff's motion.

3. Security Automotive's lease form has three boxes at the end of the lease labelled "corporation," "partnership" and "sole proprietor." It was the policy and practice of Security Automotive to have one of these three boxes checked if the lease were for business purposes, depending on the form of organization of the business. It was the policy and practice of Security Automotive to have none of the boxes checked if the lease were with an individual for personal, family or household purposes.

4. Betty Lundquist leased the 1988 Peugeot for personal, family or household purposes.

5. *Exhibit F* to the pending motion is a "contract in the form of a lease . . . for the use of personal property by a natural person."

6. [7.] *Exhibit I*, attached to plaintiff's response to Security Automotive's motion to dismiss, is an accurate copy of Statement of Financial Accounting Standards No. 13.

The magistrate assumes familiarity with, and incorporates by reference herein, his 18 page opinion of June 9, 1992. Section 1667a of the Consumer Leasing Act requires that the lessor provide the lessee with a written statement "setting out accurately and *in a clear* and conspicuous *manner* . . .

> (11) . . . *the* amount or *method of determining any penalty or other charge* for delinquency, default, late payment, or early termination."

(Emphasis added). In addition to the requirement that a disclosure be "clear", according to the regulations, the disclosures required by section 1667a also must be made in a "meaningful sequence". 12 C.F.R. § 213 (1991). Further, according to the Official Commentary, they must be written in a "reasonably understandable form." 12 C.F.R. 203, Supp 1 (1991).

The lease at issue here provides in pertinent part that if the lessor terminates (for certain stated reasons) charges will be imposed. One of the charges is for "the amount, if any, by which the sum of the Adjusted Lease Balance as described in Item 8, plus one Base Payment, Item 3A, exceeds the Realized Value, as determined in accordance with Item 15." Complaint Ex. 1, Item 16. Item 8 deals with the allocation of monthly lease payments and, in turn, refers to the Statement of Financial Accounting Standards No. 13.

Congress obviously felt that it was important for consumers to have a certain level of understanding with respect to termination charges. 15 U.S.C. § 1667a(11). It wanted consumers to know either the *amount* of such charges or the *method* of determining those charges. Accordingly, the statute provides that there must be disclosure of either a sum certain amount or the method of arriving at one. No matter which disclosure option is chosen by the lessor, however, it must be reasonably understandable to the consumer. Congress did not intend to give lessors an option to substitute an abstruse verbal formula for disclosure of a reasonably understandable sum certain.

Defendant is correct that § 1667a(11) allows it the option of disclosing either the amount, or the method by which the amount of early termination charges may be determined. In its papers in opposition to this motion, the defendant is also cor-

rect that resort to cross-referencing is not necessarily impermissible. Indeed, the Official Commentary notes that lessors may cross-reference rather than repeat items which are disclosed elsewhere. However, the defendant is incorrect that its disclosure in Item 16 of the "method" for determining early termination charges is "reasonably understandable".

The magistrate has no doubt that defendant Security Automotive, and its accountants and lawyers, have always understood the method they would use to determine plaintiff's charges in event of termination. But, it is not enough that the lessor (the normal profferer of lease documentation) finds the lease's disclosures to be "reasonably understandable," for the law was not written to protect lessors. The law was written to protect consumers, people who are generally less sophisticated than the lessors with whom they deal, and who ordinarily would be expected to lack the same financial resources that are at the lessor's disposal. For a disclosure to pass muster, therefore, it must be "reasonably understandable" from the perspective of the average consumer. Whether a particular provision of a lease is sustainable as a matter of law, fails as a matter of law, or presents a genuinely disputed issue of material fact is a threshold question for the court.

That question must be resolved in plaintiff's favor in this case. The disclosure at issue here is not "reasonably understandable." Moreover, the disclosure in Item 16(c) is not "clear", but is confusing, unduly complicated, and unnecessarily convoluted. Therefore, the plaintiff's motion for partial summary judgment should be granted with respect to her claim that the lease fails to make an adequate disclosure of the method of determining charges for termination by default, delinquency, or late payment.

Since a single violation of the Act suffices, there is no need to address the two other Consumer Leasing Act claims which are the subject of the pending motion. Any party is free to timely seek the district judge's review of this report and recommendation as provided by 28 U.S.C. § 636(b) and Rule 72, F.R.Civ.P., bearing in mind that the failure to do so may preclude further review.

Dated at Hartford, Connecticut, this 13th day of August, 1992.

/s/ THOMAS P. SMITH
THOMAS P. SMITH
U.S. MAGISTRATE JUDGE

After careful review, and over objection, Magistrate Judge Smith's Recommended Ruling is hereby AFFIRMED, APPROVED and ADOPTED.

SO ORDERED.

/s/ T. F. GILROY DALY
T. F. Gilroy Daly
U.S. MAGISTRATE JUDGE

October 7, 1992

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

CIV. NO. 5:91-754(TFGD)

BETTY LUNDQUIST,

Plaintiff,

—v.—

SECURITY PACIFIC AUTOMOTIVE FINANCIAL SERVICES CORPORATION,

Defendant.

MAGISTRATE'S OPINION

Plaintiff, Betty Lundquist, moves to certify a class action pursuant to Fed. R. Civ. P. 23 against defendant Security Pacific Automotive Financial Service Corporation ("Security Pacific"). Plaintiff alleges violations of the Consumer Leasing Act, 15 U.S.C. §§ 1667-1667e and implementing regulations, 12 C.F.R. §§ 213.1-213.8 as well as state law relating to deceptive practices. The magistrate's recent opinion regarding defendant's motion to dismiss discusses the allegations of the complaint, and familiarity with them is presumed. For the following reasons, plaintiff's motion for class certification should be denied.

DISCUSSION

A party seeking class certification must comply with the four conjunctive requirements of Fed. R. Civ. P. 23(a) and one of the three subdivisions of Rule 23(b). *Eisen* v. *Carlisle and Jacquelin*, 417 U.S. 156, 163 (1974). In determining whether the prerequisites have been met, the court must undertake a rigorous analysis and may not presume their existence. *McKernan*

v. *United Technologies Corp.*, 120 F.R.D. 452, 453 (D. Conn. 1988) (citing *General Telephone Co. of Southwest* v. *Falcon*, 457 U.S. 147, 161 (1982)). Because the plaintiff has failed to satisfy the stringent requirements of both Rule 23(a) and Rule 23(b), the pending motion for class certification must be denied.

Rule 23(a) provides:

> *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

The plaintiff defines her class to include all persons who signed contracts with Security Pacific using forms similar to the one she signed. The District Court of Connecticut has recently ruled on a motion for class certification nearly identical to the one in question here. *McCarthy* v. *PNC Credit Corp.*, Civil No. H-91-854 (D.Conn. May 27, 1992). *McCarthy*, like the present case, concerned automobile leases alleged to violate the Truth in Lending Act. In both cases the class definition, relief sought, plaintiff's and defendant's respective counsel, and large portions of the memoranda supporting and opposing class certification were identical.

The *McCarthy* court acknowledged that the plaintiff satisfied the Rule 23(a)(1) numerosity requirement, but concluded that the class was defined too broadly to meet the (a)(2) commonality requirement and the (a)(3) typicality requirement:

> [H]ere there is a high likelihood that the circumstances of each transaction may be disparate at best and perhaps substantially dissimilar from that of the named plaintiff. Plaintiff offers no indication that members of the class defaulted under similar circumstances; whether they incurred excess mileage charges; or were in some other

> way harmed by the alleged illegality of the lease form in question. *Id.*, at 4.

Although Lundquist, unlike the plaintiff in *McCarthy*, did not default on her lease, this distinction is too minuscule to compel a different result here.

Even if the plaintiff were to tailor the class definition to conform to the requirements of Rule 23(a), her motion for class certification also is vulnerable to denial on grounds of lack of necessity under Rule 23(b). The plaintiff seeks to maintain her class action under Rule 23(b)(2), or alternatively Rule 23(b)(3) Rule 23(b) provides:

> *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied and in addition. . . :
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
>
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Although necessity is not an explicit requirement to maintain a class action, the Second Circuit and the District of Connecticut have long read such a requirement into Rule 23. *Galvan* v. *Levine*, 490 F.2d 1255 (2d Cir. 1973), *cert, denied*,

417 U.S. 936 (1974); *Bridgeport Guardians, Inc.* v. *Members of Bridgeport Civil Serv. Comm'n*, 354 F. Supp. 778 (D. Conn. 1973), *aff'd in part & rev'd in part*, 482 F. 2d 1333 (2d Cir. 1973), *cert. denied*, 421 U.S. 991 (1975).

Courts have varied, however, in their application of the necessity requirement, selecting one of three approaches. Most frequently, courts have viewed necessity as a requirement to maintain a class action under each of the Rule 23(b) numbered options. *Davis* v. *Smith*, 607 F.2d 535 (2d. Cir. 1978); *Ruiz* v. *Blum*, 549 F. Supp. 871 (S.D.N.Y. 1982); *Bridgeport Guardians, supra*. Alternatively, some courts have required necessity only where a party seeks to maintain a class action pursuant to Rule 23(b)(2). *Dionne* v. *Bowley*, 757 F.2d 1344 (1st Cir. 1985); *Doe* v. *Coughlin*, 697 F. Supp. 1234 (N.D.N.Y. 1988); *Rios* v. *Marshall*, 100 F.R.D. 395 (S.D.N.Y 1983). In rare instances, courts have viewed necessity as an additional requirement for class certification separate from Rule 23(b). *Koster* v. *Perales*, 108 F.R.D. 46 (E.D.N.Y. 1985). Because necessity is a factor in deciding whether a class action is "appropriate" pursuant to Rule 23(b)(1) and "superior" pursuant to Rule 23(b)(2), and because requiring necessity outside of Rule 23(b) would therefore be redundant, the first option above should apply.

Courts have usually invoked lack of necessity to deny a motion for class certification where the benefits of declaratory judgment and injunctive relief will inure to all members of the proposed class, rendering class certification a mere formality. *Davis* v. *Smith*, 607 F.2d at 540; *Feld* v. *Burger*, 424 F. Supp. 1356, 1363 (S.D.N.Y. 1976). Although most of these cases have involved actions against government officials, where the court expects the judgment to be applied equally to all persons situated similarly to the plaintiff, *Ruiz* v. *Blum*, *supra*, 549 F.Supp. at 878, necessity must be demonstrated in private actions as well. *Gray* v. *International Brotherhood of Elec. Workers*, 73 F.R.D. 638, 640-1 (D.D.C. 1977); *Kuck* v. *Berkey Photo, Inc.*, 81 F.R.D. 736, 739 (S.D.N.Y. 1979) (No necessity for extending class action to future workers who will benefit from an injunction); *Velez* v. *Amenta*, 370 F. Supp. 1250, 1255 (D. Conn. 1974) (Certifying class, but addressing issue of necessity).

Lundquist has not demonstrated a need for class certification. The plaintiff seeks, primarily, a declaration that a lessee can terminate its auto lease without incurring a substantial penalty and an injunction prohibiting the defendant from acting to collect the penalty. (Plaintiff's Reply Memorandum at 19). The injunction, if granted, would bar Security Pacific from collecting penalties from any person who signed the auto lease in question, regardless of class certification. Similarly, any declaratory relief granted to the plaintiff would apply to all lessees. Since the requested relief would benefit the entire proposed class, a class action would be superfluous here. *Stanton* v. *Board of Educ. of Norwich*, 581 F. Supp. 190 (N.D.N.Y. 1983). Lundquist also seeks monetary damages, but, again, a class action is not warranted. The plaintiff could opt for a "test case" approach which would likely yield the same result as a class action under principles of collateral estoppel. *Windham* v. *American Brands, Inc.*, 565 F. 2d 59, 69 (4th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978).

Additionally, there is no reason that the plaintiff could not continue this suit absent class certification. *Id.*; *Stoudt* v. *E. F. Hutton & Co., Inc.*, 121 F.R.D. 36, 38 (S.D.N.Y. 1988). There is no evidence of impoverishment or the inability of any putative plaintiff to pursue an action independently. moreover, the Truth in Lending Act requires a creditor who fails to comply with the Act to pay to the plaintiff the costs of the plaintiff's action as well as a reasonable attorney's fee. 15 U.S.C. § 1640(a)(3). An unsuccessful creditor may avoid paying these fees only in the most unusual circumstances. *DeJesus* v. *Bance Popular de Puerto Rico*, 918 F. 2d 232, 234 (1st Cir. 1990). The assurance of reimbursement upon success provides the plaintiff with ample incentive to continue her suit.

Finally, still another reason militating against class certification in this case is the unwarranted burden that certification would impose on Connecticut's already limited judicial resources. As of June 30, 1991, over 460 cases per judge were pending in the District of Connecticut, making it the district with the fifth heaviest caseload among the 92 United States district courts in the nation. *1991 Federal Court Management*

Statistics, 45. During roughly the same period, Connecticut had the seventh greatest increase in filings among U.S. District Courts nationwide.

In light of the foregoing, to certify this as a class action would place a needless strain on scarce judicial resources. Given the ubiquity of the defendant's auto lease form, it would not be surprising if the proposed class included residents of most of the American states and territories. As a result, state claims alone could well require fracturing the class into upwards of fifty subclasses. Factual disparities between class members would add to the confusion. "Rule 23 is designed as an instrument of convenience, and should not be permitted to impose an unjustified burden upon judicial resources." *Kassover* v. *Computer Depot, Inc.*, 691 F. Supp. 1205, 1213 (D. Minn. 1987). To certify a class action here would contravene the public interest served by Rule 23. *Schaffner* v. *Chemical Bank*, 339 F. Supp. 329, 337 (S.D.N.Y. 1972).

Dated at Hartford, Connecticut, this 9th day of June, 1992.

/s/ THOMAS P. SMITH
THOMAS P. SMITH
U.S. MAGISTRATE JUDGE

After careful review and over objection, Magistrate Judge Smith's Recommended Ruling is hereby AFFIRMED, APPROVED and ADOPTED. To the extent that the plaintiff seeks to amend the scope of her proposed class in a reply brief in support of her objection to Magistrate Judge Smith's Recommended Ruling, the purported amendment is both untimely and improperly presented.

SO ORDERED.

/s/ T. F. GILROY DALY
T. F. Gilroy Daly U.S.D.J.

October 19, 1992

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

CIVIL NO. 5:91CV00754(TFGD)

BETTY LUNDQUIST, on behalf of herself and all others similarly situated,

Plaintiffs,

—v.—

SECURITY PACIFIC AUTOMOTIVE FINANCIAL SERVICES CORPORATION,

Defendant.

MAGISTRATE'S OPINION

This proposed class action[1] has been brought by an automobile lessee against the defendant for allegedly violating provisions of the Consumer Leasing Act, 15 U.S.C. §§ 1667-1667e and implementing regulations, 12 C.F.R. §§ 213.1-213.8 ("Regulation M") as well as applicable state law. The defendant has moved to dismiss plaintiff's claims under Fed. R. Civ. P. 12(b)(6) and for lack of standing. For the foregoing reasons, defendant's motion should be granted in part and denied in part.

ALLEGATIONS OF THE COMPLAINT

On June 11, 1988, Betty Lundquist signed and entered into what was labeled "Vehicle Lease Agreement Closed End" with a New York automobile dealer for a 1988 Peugeot automobile.[2]

1 A class has not yet been certified; this issue will be addressed in a later opinion or endorsement to be filed in due course.

2 A copy of the lease was attached to the complaint as Exhibit "A".

The lease terms provided that Ms. Lundquist was to make 60 monthly payments to the defendant for the lease of the vehicle with an option to purchase at the end of the term. The automobile was leased for personal use.[3]

The lease expressly provided that, as lessee, the plaintiff had "no right to terminate [the] lease prior to the scheduled end of its term." Nevertheless, during the lease period Ms. Lundquist inquired about terminating the lease early. The defendant informed her that she would be allowed to terminate prematurely in exchange for a certain sum.[4]

The plaintiff alleges that the defendant has a regular practice of allowing lessees to terminate lease agreements prior to their scheduled expiration. Plaintiff contends that this practice violates the disclosure requirements of 15 U.S.C. § 1667b(b). Further, plaintiff alleges that other portions of the lease agreement violate the disclosure and reasonableness requirements in the Consumer Leasing Act. Finally, plaintiff seeks declaratory judgments that the violative lease provisions are unenforceable under state law and that defendant violated state consumer protection laws.

DISCUSSION

Defendant has moved to dismiss the plaintiff's complaint on several different grounds. Thus, the court will discuss each basis separately.

A. Claims for Consumer Leasing Act Violations

Defendant first contends that plaintiff's complaint should be dismissed under Fed. R. Civ. P. 12(b)(6) on the grounds that the lease does not violate any part of the Consumer Leasing Act. In considering this argument in a motion to dismiss, the court must only review the allegations of the complaint to test their legal sufficiency. *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974);

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3 Thus, the lease was a "consumer lease" as defined in the Act. 15 U.S.C. § 1667(1) (1982).

4 The specifics that were allegedly discussed at this time are nowhere in the complaint.

National Union Fire Ins, Co. v. *Mastroni*, 754 F. Supp. 269, 272 (D. Conn. 1990).

The Consumer Leasing Act ("CLA") is part of a larger statutory scheme known as the Truth in Lending Act ("TILA"), 15 U.S.C. §§ 1601-1693r (1982).

> The Truth-in-Lending Act was passed primarily to aid the unsophisticated consumer so that he would not be easily misled as to the total costs of financing. For when doing business as usual the figures on conditions randomly placed on the traditional form would reveal to the average businessman the true cost of the transaction, but for the inexperienced or uninformed there was the possibility of deception, misinformation, or at least an obliviousness to the true costs which some day they would have to pay.

Thomka v. *A.Z. Chevrolet, Inc.*, 619 F.2d 246, 248 (3d Cir. 1980). One of the stated purposes for enacting TILA and CLA was to "assure a meaningful disclosure of the terms of leases . . . so as to enable the lessee to compare more readily the various lease terms available to him." 15 U.S.C. § 1601(b) (1982). Because TILA is a remedial statute, it is interpreted strictly in favor of the consumer. *Frazee* v. *Seaview Toyota Pontiac, Inc.*, 695 F. Supp. 1406, 1408 (D. Conn. 1988). Technical violations of the disclosure provisions and penalty limitations of CLA support an award for statutory damages. 15 U.S.C. § 1667d (1982); *cf. Fox*, 695 F. Supp. at 1408.

1. Lessee's Right to Terminate

The CLA requires that a lease contain "[a] statement of the conditions under which the lessee or lessor may terminate the lease prior to the end of the term . . . ." 15 U.S.C. § 1667a(11) (1982); *accord* 12 C.F.R. § 213.4(g)(12) (1991). In part 7 of the lease, entitled "No Voluntary Early Termination," it stated that the lessee had "no right to terminate this lease prior to the scheduled end of its term." The plaintiff claims this does not adequately disclose the *actual* conditions under which the lessee may terminate early because the defendant routinely allows lessee's to terminate under certain conditions. The plain

language of section 1667a(11) reveals that the plaintiff has stated a valid claim.

Defendant contends the statement accurately discloses that the lessee has no "right" to voluntarily terminate. Defendant argues that while it may assent at some later time to a consumer's request to terminate early, that does not constitute a lessee's "right" under the lease. Instead, defendant argues that any subsequent release from the lease obligations should be considered a modification of the original contract. However, defendant's *disclosure* may still be inadequate. The plaintiff complains that the defendant customarily allows lessees to voluntarily terminate upon payment of money and simply because the lease discloses that the lessee has no "right" to terminate, defendant has not revealed the actual conditions for early termination as required by the CLA. This allegation states a claim upon which relief can be granted. *See Candelaria* v. *Nissan Motor Acceptance Corp.*, 740 F. Supp. 806, 809-10 (D. N.Mex. 1990) (Court found similar disclosure violations where lease stated: "If lessee desires to terminate early, lessee should contact lessor.").

2. Amount or Method of Early Termination Charges

In the complaint, the plaintiff asserted that the lease provisions setting out the early termination charges (in the event the lessor initiated termination) also violated the disclosure requirements of section 1667a. The statute requires that "the amount or method of determining any penalty or other charge for . . . early termination" be set out "accurately and in a clear and conspicuous manner." 15 U.S.C. § 1667a (1982); *accord* 12 C.F.R. § 213.4 (1991). According to the regulations, these disclosures must be made in a "meaningful sequence" and the accompanying official staff commentary states that they be written in a "reasonably understandable form." *Id.*; 12 C.F.R. § 213, Supp. 1 (1991). The broad policies of the act require that disclosures be "meaningful" in the eyes of the lessee. Accordingly, courts have consistently ruled that the CLA and TILA were designed to promote a well-informed consumer. *Mourning* v. *Family Publs. Servs, Inc.*, 411 U.S. 356, 364

(1973); *Candelaria* v. *Nissan Motor Acceptance Corp.*, 740 F. Supp. 806 (D.N.Mex. 1990); *Kedziora* v. *Citicorp Nat'l Servs., Inc.*, 1991 U.S. Dist. LEXIS 17128.

The lease at issue provides that if the lessor terminates early (for certain stated reasons) charges will be imposed. One of the charges is for "[t]he amount, if any, by which the sum of the Adjusted Lease Balance as described in Item 8, plus on Base Payment, Item 3A, exceeds the Realized Value, as determined in accordance with Item 15." Complaint, Ex. A, pt. 16. Standing alone, this provision is not reasonably understandable; looking at the cross-referenced portions fails to make it substantially clearer to a layman. Obviously, at least some degree of familiarity with technical accounting terms seems necessary to calculate charges of this type. While it is true that the Supreme Court has held that every technical element of agreements like this need not be fully explained, *see Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 568 (1980) ("Meaningful disclosure does not mean more disclosure. . . . [but] a balance between 'competing considerations of complete disclosure . . . and the need to avoid . . . informational overload.' ") (quoting legislative history); *see also Gambardella* v. *G. Fox, & Co.*, 716 F.2d 104 (2d Cir. 1983), in the context of a 12(b)(6) motion, *Milholin* does not require dismissal. Indeed, looking at the claim in a light most favorable to the plaintiff, it is certainly arguable that this provision of the lease fails to strike the appropriate balance between meaningful disclosure and informational overload. Therefore, this aspect of defendant's notion also is denied.

3. Use of Wholesale Price for Valuation

The "Realized Value" mentioned above used to compute early termination liability requires calculating the vehicle's value at the time the lease is terminated and the vehicle returned to the lessor. Item 15 of the lease explains that the "Realized Value" of the vehicle can be calculated using the wholesale value of the vehicle at the time of termination. Within the first 10 days after the vehicle is returned, the lessee can obtain a professional appraisal of the wholesale value.

Otherwise, the lessor can attempt to sell it for wholesale "or may establish the Realized value in some other commercially reasonable manner." Complaint, Ex. A. Finally, even if the lessor chooses not to sell the vehicle, the highest bona fide bid will be used as the realized value.

The plaintiff alleges that the "use of the amount realized by selling the vehicle at wholesale is not a reasonable method of determining the consumer's liability . . ." as part of her broader claim that the early termination charges are unreasonable. However, the regulations and commentary make it clear that wholesale pricing is an appropriate method to estimate the realized value.

The regulations express that unknown information may be estimated "provided the estimate . . . is reasonable." 12 C.F.R. § 213.4(d). The Official Staff Commentary accompanying this provision states:

> The lessor may chose either a retail or a wholesale value in estimating the value of the leased property at termination, provided that choice is consistent with the lessor's general practice or intention when determining the value of the property at the end of the lease term.

12 C.F.R. § 213.4(d)(4), Supp. 1 (1991). While the plaintiff alleges that the use of wholesale pricing is unreasonable, the staff commentary specifically states that wholesale valuation is appropriate.[5] *Id.*; *see also Kedziora*, 1991 U.S. Dist. LEXIS 17128. The Supreme Court has held that these staff commentaries are entitled to substantial deference. *Ford Motor Credit Co.*, 444 U.S. at 567-68; *see also Candelaria*, 740 F.Supp. at 807. In view of all of the foregoing, that portion of the complaint alleging that the use of wholesale pricing for this purpose is unreasonable should be dismissed. 28 U.S.C. § 636(b).

4. Initial Purchase Price

The complaint alleges that the depreciation figures in the lease are inflated because the actual purchase price of the vehi-

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5 There is no claim that the defendant's use of wholesale pricing is inconsistent with its general practice.

cle was substantially lower than the purchase price used in the depreciation calculations. According to the complaint, using this inflated purchase price to calculate depreciation upon early termination results in unreasonable early termination charges in violation of 15 U.S.C. § 1667b(b). On the face of the complaint, this states a claim which requires further factual development concerning, among other things, the origin and accuracy of these figures.

5. Excess Mileage Charge

Part 9 of the lease provides:

> I [Lessee] understand that you [lessor] have based the Total Monthly Lease Payment on normal wear and tear and, . . on the assumption that I will drive the vehicle an average of 15,000 miles (standard mileage) or less each year, I agree that, if I drive the vehicle in excess of the standard . . . and if I do not purchase the vehicle at the scheduled end of the term of this lease, I will pay an excess mileage charge of ten (10) cents per mile for each mile the vehicle is driven in excess of the standard . . . .

Complaint, Ex. A. Plaintiff alleges that this ten cent charge violates the requirement that standards for wear and use be reasonable. 12 C.F.R. § 213.4 (g)(8) (1991). Complaint, ¶¶ 31-33. Again, it is too early in the litigation to determine the reasonableness of the "excess mileage charge". The defendant does not point to any statutory authority specifically supporting the ten cent per mile charge. The plaintiff must be afforded the opportunity to adduce factual evidence to substantiate her claim that the charges are unreasonable.[6]

6. Disclosure of Warranties

The plaintiff alleges violations of 15 U.S.C. § 1667a(6) which requires "a statement identifying all express warranties and guaranties made by the manufacturer or lessor with respect

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6 The standing issue cursorily raised by defendant in this part of its brief is addressed in part B of this opinion.

to the leased property." *Accord* 12 C.F.R. § 213.4(g)(7) (1991). The lease's warranty provision states:

> To the extent they are assignable, you [lessor] agree to assign to me [lessee] all of your rights and remedies under any warranties applicable to the vehicle which have been made by its manufacturers. I acknowledge that you makes no express warranties regarding the vehicle that I am leasing it from you "as is" and that the entire risk as to the quality and performance of the vehicle is with me.

Complaint, Ex. A (Capital letters omitted). This clause contains sufficient ambiguity as to the *identity* of warranties available to the lessee to deny defendant's motion to dismiss this portion of the complaint. Further factual development is necessary to adduce what, if any, warranties were expressly made by the manufacturer and whether this clause adequately disclosed them.

The defendant also contends that the plaintiff lacks standing to litigate the portion of the complaint concerning extended warranties on the grounds that there was no extended warranty sold to the plaintiff.[7] Ultimately, the defendant may prove correct. The lease contains a provision for a service contract; however, the parties allegedly wrote "n/a" in the blank spaces and failed to initial it. *See* Complaint, Ex. A. The plaintiff, however, is not necessarily alleging that extended warranties are part of her agreement. Thus, the accuracy of the warranty provision in leases where an extended warranty is sold is not necessarily before the court. Therefore, on the record it is not appropriate to pronounce that the plaintiff has no "standing" to argue this issue. *Cf. Kedziora* v. *Citicorp Nat'l Servs., Inc.*, 1991 U.S. Dist. LEXIS 17128.

In another sentence of the warranty provision the lessee initially agrees to resolve disputes over the manufacturer's warranty through the manufacturer's dispute resolution system. The complaint alleges, under the heading "Classwide

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7 The complaint states: "Moreover, the disclosure is inaccurate and incomplete in any case where an extended warranty is sold." Complaint, ¶ 34(f).

Disclosure Violations," that this clause unfairly limits the lessee's rights. This portion of the plaintiff's complaint also may eventually be dismissed, for at present there seems to be a paucity of authority to support plaintiff's proposition that this sentence violates any disclosure requirements of the CLA. For now however, the magistrate notes that a more fully developed record is desirable before deciding this question.

7. Option to Purchase

Part 11 of the lease allows the plaintiff to purchase the vehicle at the end of the lease term under certain conditions. The provision mentions the "adjusted lease balance" as one figure used to calculate the purchase price, but does not cross reference part 8—the part illustrating how to calculate the adjusted lease balance. The complaint alleges that because the provision uses the term without a cross reference to part 8, the purchase price is inadequately disclosed. *See* 15 U.S.C. § 1667a(5) (1982). This claim is without merit.

Disclosures do not have to be perfect to be in compliance with CLA and TILA. *See Gambardella* v. *G. Fox & Co.*, 716 F.2d 104 (2d Cir. 1983); *Sanders* v. *Auto Assoc., Inc.*, 450 F. Supp. 900, 904 (D. S.C. 1978). The CLA requires that the lease clearly and conspicuously disclose the price of leased property if the lessee has the option to purchase it. 12 C.F.R. 213.4(g)(7) ("[a] statement . . . whether or not the lessee has the option to purchase the lease property and at what price and time"). The plaintiff argues that the failure to cross-reference part 8 makes the provision violative of the CLA. However, the statute does not specifically require cross-referencing and part 8 is on the same page with the term "Adjusted Lease Balance" conspicuously printed. It is fully explained only three paragraphs earlier so that a consumer reading the entire document could easily recall its location. Furthermore, part 8 separates the clause containing the "Adjusted Lease Balance" and capitalizes the first letter of each word so that it is easy to locate. Therefore, the plaintiff cannot show that this missing cross reference violates the "clear and conspicuous requirement for disclosures. This portion of plaintiff's claim should be dismissed.

B. Standing to Determine Reasonableness of Termination Charges

The defendant has also moved to dismiss Count I of the complaint on the grounds that the plaintiff lacks standing to litigate the reasonableness of the early termination charges. Defendant contends that because the plaintiff's lease has not been terminated, she has not suffered any injury and is not entitled to declaratory relief. For the reasons that follow, the court disagrees.

The plaintiff is a party to the lease and bound by its terms. If the plaintiff decides to default on the lease, she will be subject to the early termination charges. There is an immediate threat of injury to her because if she returns the car she would be subject to these allegedly unreasonable charges. *See Valley Forge Christian College* v. *Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982) ; *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975). Article III is not violated where there is "a real and substantial controversy admitting of specific relief through a decree of conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 241 (1937).[8]

Actions for declaratory relief are routinely upheld where one party to an agreement seeks a determination of the respective rights and liabilities under the contract terms. In those cases, declaratory relief is appropriate without requiring the parties to commit a breach or sustain damages. *E.g.*, *Keener Oil & Gas Co.* v. *Consolidated Gas Utilities Corp.*, 190 F.2d 985, 989 (10th Cir. 1951) ("[A] party to the contract is not compelled to wait until he has committed an act which . . . will constitute

8 This is the principle difference between the relief sought here and in *Kedziora*, relied on by the defendant. In that case the plaintiff lacked standing to litigate the reasonableness of pre-12-month early termination charges brought after the 12 month period expired. The court would not decide this issue "just on the basis that it would have been unreasonable as to some hypothetical other lessee." *Kedziora* v. *Citicorp Nat'l Servs., Inc.*, 1991 U.S. Dist. LEXIS 17128. Here, the terms are clearly applicable to this plaintiff since she would in fact be bound by the provision if she chooses to terminate early. Thus, *Kedziora* is easily distinguished.

a breach, but may seek relief by declaratory judgment, and have the controversy adjudicated in order that he may avoid the risk of damages or other untoward consequences."); *Fine* v. *Property Damage Appraisers, Inc.*, 393 F. Supp. 1304, 1310 (E.D. Lous. 1975) ("The use of declaratory judgment is particularly compelling where the validity of an anti-competitive clause is questioned because otherwise plaintiff is left to test it only by his breach of contract, subjecting himself to the risk that the clause be held enforceable . . . ."); *Dworman* v. *Mayor and Bd. of Aldermen, etc, Morristown*, 370 F. Supp. 1056, 1059 (D. N.J. 1974). Accordingly, the plaintiff has a sufficient stake in the outcome of this issue to satisfy the standing requirements of Article III.

The defendant also argues that because there has been no actual early termination it is impossible to accurately determine the reasonableness of the charges. This argument ignores the plain language of section 1667b(b): ". . . early termination may be specified in the lease but only at an amount which is reasonable in the light of the *anticipated or actual harm* caused by the . . . early termination . . . and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy." 15 U.S.C. § 1667b (1982) (emphasis added). The parties certainly need not actually terminate the lease early to accurately prove the reasonableness of the "anticipated harm" because these words imply that actual harm is unknown. Furthermore, the actual harm that would stem from early termination is readily ascertainable in a common consumer automobile lease of this type. Presumably, the defendant is a leasing company with many similar leases and can adequately defend these charges using previous agreements. Therefore, the plaintiff does not have to violate the agreement before the reasonableness of these charges can be determined.

C. Unfair and Deceptive Trade Practices

Count IV of the complaint seeks relief under applicable state consumer protection statutes. Complaint, ¶¶ 50-54. To clarify, the complaint mentions the Connecticut statute, 42-110a *et. seq.* Conn. Gen. Stat., as an example of such a statute. *Id.*,

¶ 51. The defendant has moved to dismiss any claim under Connecticut law because the transaction between the defendant and the named plaintiff took place entirely in New York. Additionally, defendant contends that this count should be dismissed for failing to specify the applicable consumer protection statutes.

Defendant's first reading of the complaint is too narrow. The plaintiff has not specifically stated that Connecticut law necessarily applies. Further, it is too early to dispose of this claim because subsequent discovery should flush out which state laws are implicated. Requiring the plaintiff to know all the applicable state laws for this type of class claim would be unrealistic. The defendant has sufficient notice of the substance of plaintiff's claims in Count IV. Therefore, this aspect of defendant's motion should be denied.

CONCLUSION

Defendant's motion should be granted as to 1) the claim that the use of wholesale pricing to calculate realized value is unreasonable; 2) the claim alleging that the agreement to resort to the dispute resolution system violates the CLA; and 3) the claim that alleges disclosure violations under part 11 of the lease. The remainder of defendant's motion should be denied.

Dated at Hartford, Connecticut, this 9th day of June 1992.

/s/ THOMAS P. SMITH
Thomas P. Smith
U.S. Magistrate Judge

After careful review and absent objection, Magistrate Judge Smith's Recommended Ruling on the defendant's motion to dismiss is hereby AFFIRMED, APPROVED and ADOPTED.

SO ORDERED.

/s/ T. F. GILROY DALY
T. F. Gilroy Daly, U.S.D.J.

July 20, 1992

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

CIVIL NO. 5:91cv00754 (TFGD)

BETTY LUNDQUIST,

—v.—

SECURITY PACIFIC AUTOMOTIVE,

JUDGMENT

This cause came on for consideration on the plaintiff's motion for judgment of damages before the Honorable T. F. Gilroy Daly, United States District Judge, and

The Court having considered the plaintiff's motion and all the papers submitted in connection therewith granted the motion, absent objection, and further ordered the Clerk of the Court to enter judgment for the plaintiff on her complaint in the amount of $1,000.00,

It is therefore ORDERED and ADJUDGED that the action be and hereby is entered in favor of the plaintiff in the amount of $1,000.00, in accordance with the Court's order.

Dated at Bridgeport, Connecticut this 25th day of November, 1992.

KEVIN F. ROWE, Clerk

By /s/ CAROL E. CANNADY

Carol E. Cannady
Deputy in Charge

UNITED STATES COURT OF APPEAL

FOR THE SECOND CIRCUIT

Nos. 92-9288 & 92-9362

Filed July 22, 1993

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 22nd day of July, one thousand nine hundred and ninety-three.

BETTY LUNDQUIST, on behalf of herself and all others similarly situated,

Plaintiff-Appellant-Cross-Appellee,

—v.—

SECURITY PACIFIC AUTOMOTIVE FINANCIAL SERVICES CORP.,

Defendant-Appellee-Cross-Appellant.

A petition for rehearing containing a suggestion that the appeal be reheard in banc having been filed herein by defendant-appellee-cross-appellant Security Pacific Automotive Financial Services Corp.

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

The panel reconsidered the issue of appellate jurisdiction, and found that the district court had entered a final appealable order. The defendant-appellee has not suggested any specific claims that remain to be decided by the district court and the

plaintiff-appellant has been granted her maximum relief. The entry of judgment thus vested the panel with jurisdiction.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
ELAINE B. GOLDSMITH, Clerk

By /s/ CAROLYN CLARK CAMPBELL
Carolyn Clark Campbell
Chief Deputy Clerk

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

CASE NO. 5:91CV00754 TFGD

November 7, 1992

BETTY LUNDQUIST,

—v.—

SECURITY PACIFIC AUTOMOTIVE,

MOTION FOR JUDGMENT OF DAMAGES

Plaintiff moves for the entry of $1,000 statutory damages. Since summary judgment has been granted in her favor, class certification has been denied, and her individual claim is effectively limited to $1,000 (plus attorney fees and costs), no useful purpose would be served by a trial. Defendant does not object to this motion.

Neither party waives any claims of error in the denial of class certification or the grant of summary judgment. In the event of class certification, defendant reserves the right to contest damages and plaintiff reserves the right to pursue the class claims asserted in the complaint.

THE PLAINTIFF

By /s/ JOANNE S. FAULKNER

Joanne S. Faulkner ct04137
123 Avon Street
New Haven, CT 06511
(203) 772-0395

GRANTED absent objection such that the Clerk of the Court is hereby directed to enter judgment for the plaintiff on her complaint in the amount of $1,000.00.

SO ORDERED.

/S/ T. F. GILROY DALY

T. F. Gilroy Daly, U.S.D.J.

November 12, 1992

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

CIV. NO. 5-91-754(TFGD)

BETTY LUNDQUIST, on behalf of herself and all others similarly situated,

Plaintiff,

—v.—

SECURITY PACIFIC AUTOMOTIVE FINANCIAL SERVICES CORPORATION,

Defendant.

COMPLAINT

MATTERS COMMON TO MULTIPLE COUNTS

Introduction

1. This class action challenges certain practices of Security Pacific Automotive Financial Services Corporation in connection with automobile leases. Plaintiff alleges that Security Pacific imposed excessive and unreasonable default/early termination charges, in violation of the substantive restrictions of the federal Truth in Leasing Act, 15 U.S.C. § 1667 et seq. and failed to comply with the disclosure requirements of the Truth in Leasing Act. Related claims under state law are also alleged.

Jurisdiction and Venue

2. This Court has jurisdiction over the federal claims under 28 U.S.C. § 1331 and 15 U.S.C. §§ 1640 and 1667d, and supplemental jurisdiction over the state claims. Venue in this District is proper under 28 U.S.C. § 1391(b)-(c), in that Security Pacific Automotive Financial Services Corporation has a registered office in this District, c/o CT Corporation

System, One Commercial Plaza, Hartford, CT 06103, and is therefore subject to jurisdiction in this District.

Parties

3. Plaintiff, Betty Lundquist ("Ms. Lundquist"), is a resident of the County of New London, Connecticut.

4. Defendant Security Pacific Automotive Financial Services Corporation is a foreign corporation which is registered to do business and does business in Connecticut.

5. The regular business activities of Security Pacific Automotive Financial Services Corporation include leasing and offering to lease motor vehicles. Many of the leases are made with natural persons who lease vehicles for personal, family or household purposes. On information and belief, the intended term of most or all of Security Pacific Automotive Financial Services Corporation's vehicle leases exceeds four months. In many cases, the total contractual obligation under the lease is less than $25,000.

Ms. Lundquist's Transaction With Defendant

6. On June 10, 1988, Ms. Lundquist signed a "Vehicle Lease Agreement Closed End" with Security Pacific Automotive Financial Services Corporation, covering a 1988 Peugeot. A true and accurate copy of this document is attached as *Exhibit A*.

7. The vehicle was leased for purposes of personal transportation. The fact that this was a personal as opposed to a business lease is indicated by the fact that the three boxes at the end of the lease labelled "corporation," "partnership" and "sole proprietor" are not checked.

8. The intended term of the lease was 60 months. The total payments under the lease were $14,353.20. At the scheduled termination of the lease Ms. Lundquist had an option to pur-

chase the vehicle for an amount which is not specified in the lease, but on information and belief (based on computations of counsel) was $11,504.29.

Truth in Leasing Act

9. The federal Truth in Leasing Act, 15 U.S.C. § 1667 et seq. ("Truth in Leasing Act"), and implementing Federal Reserve Board regulations, 12 C.F.R. part 213 ("Regulation M"), and Staff Commentary, 12 C.F.R. part 213 Supp. I ("Commentary"), require extensive disclosures in consumer lease transactions and regulate certain substantive terms of such transactions.

10. The Truth in Leasing Act and Regulation M apply to any "consumer lease." A "consumer lease" is defined as a "contract in the form of a lease or bailment for the use of personal property by a natural person for a period of time exceeding four months, and for a total contractual obligation not exceeding $25,000, primarily for personal, family, or household purposes, whether or not the lessee has the option to purchase or otherwise become the owner of the property at the expiration of the lease . . . . " Leases for "agricultural, business, or commercial purposes" are excluded. 15 U.S.C. § 1667(1).

11. The Truth in Leasing Act provides for substantive regulation of charges for early termination, delinquency and default:

> Penalties or other charges for delinquency, default, or early termination may be specified in the lease but only at an amount which is reasonable in light of the anticipated or actual harm caused by the delinquency, default, or early termination, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy.

15 U.S.C. § 1667b(b).

12. The Truth in Leasing Act and Regulation M also require a "lessor" to provide a "lessee" with extensive disclosures prior to the consummation of a "lease," analogous to those required in the case of credit transactions by the Truth in Lending Act. 15 U.S.C. § 1667a. The disclosures must be made "clearly, conspicuously, [and] in meaningful sequence" and either on a separate written statement or in the contract, "above the place for the lessee's signature." 12 C.F.R. § 213.4(a). They must be "reasonably understandable," Staff Commentary, § 213.4(a)(1).

13. The specific information that must be disclosed includes:

a. "The amount or method of determining the amount of any penalty or other charge for delinquency, default, or late payments." 12 C.F.R. § 213.4(g)(10).

b. "A statement of the conditions under which the lessee or lessor may terminate the lease prior to the end of the lease term and the amount or method of determining the amount of any penalty or other charge for early termination." 12 C.F.R. § 213.4(g)(12).

c. "A statement identifying any express warranties or guarantees available to the lessee made by the lessor or manufacturer with respect to the leased property." 12 C.F.R. § 213.4(g)(7).

d. When and for how much the consumer can exercise a purchase option. 12 C.F.R. § 213.4(g)(11).

14. The Truth in Leasing Act provides that any lessor who violates any requirement imposed by 15 U.S.C. §§ 1667a, 1667b, and the implementing regulations is liable as provided in the Truth in Lending Act, 15 U.S.C. § 1640.

Applicability of Truth in Leasing Act To
Ms. Lundquist's Transaction

15. The Truth in Leasing Act and Regulation M were applicable to Ms. Lundquist's lease because:

a. Security Pacific Automotive Financial Services Corporation was a "lessor," in that it was regularly engaged in the business of leasing and offering to lease vehicles to natural persons for a period of time exceeding four months, and for a total contractual obligation not exceeding $25,000, primarily for personal, family or household purposes.

b. Ms. Lundquist is a natural person.

c. Ms. Lundquist leased the vehicle from Security Pacific Automotive Financial Services Corporation for personal, family and household purposes.

d. *Exhibit A* is a "contract in the form of a lease . . . for the use of personal property by a natural person."

e. The term of the lease exceeded four months.

f. Ms. Lundquist's total contractual obligation under the lease did not exceed $25,000.

Default/ Termination Charges

16. Item 7 of *Exhibit A* purports to state that the lessee has "no right to terminate this lease prior to the scheduled end of its term. However, if I [the lessee] am in default, you may terminate this lease and take immediate possession of the vehicle, as well as exercise any other rights you may have upon default."

17. On information and belief, Security Pacific Automotive Financial Services Corporation does in fact permit lessees to terminate their leases prior to the expiration of the scheduled term. This allegation is based on the fact that plaintiff inquired of Security Pacific Automotive Financial Services Corporation whether it would permit her to terminate her lease prior to its scheduled expiration, and Security Pacific responded in the affirmative—if plaintiff were willing to pay what Security Pacific wanted.

18. Item 16 provides for charges in the event the consumer defaults prior to the end of the lease. Item 16 states:

> EARLY TERMINATION LIABILITY
>
> At any time after I sign this lease, you may terminate it if any of the conditions described in Item 22 occur or this lease is in default as described in Item 23.
>
> I agree that my payment liability upon early termination will be the sum of:
>
> (a) A termination fee of $250; plus
>
> (b) Any monthly lease payments already due you which are unpaid and any other amounts arising from my failure to keep my promises under this lease; plus
>
> (c) The amount, if any, by which the sum of the Adjusted Lease Balance as described in Item 8, plus one Base Payment, Item 3.A., exceeds the Realized Value, as determined in accordance with Item 15; plus
>
> (d) Any official fees and taxes imposed in connection with lease termination (for example, sales/use taxes due on a deficiency balance under (c)).

19. Item 8, referred to in Item 16, states:

> ALLOCATION OF MONTHLY LEASE PAYMENTS
>
> Portions of each monthly lease payment are for depreciation, lease charge and sales/use tax. While to total amount of each monthly lease payment will be the same (assuming that current sales/use tax rates, if applicable, do not change), the depreciation and lease charge portions will differ with each payment.
>
> During the lease term you will earn a total of lease charges equal to the product of the number of monthly lease payments, due under the lease times *$102.24*, the average monthly lease charge. The lease charges will be earned by you on a constant yield basis in relation to the

Adjusted Lease Balance as it declines during the lease term. The lease charge portion for any monthly lease payment is figured by multiplying the rate which provides a constant yield throughout the lease term times the Adjusted Lease Balance. Again, the portion of the monthly payment not allocated to lease charges or sales/use tax will be allocated to depreciation. (These calculations will follow the rules for journal entries for lessors as to direct financing leases contained in Statement of Financial Accounting Standards No. 13.)

At any given time the Adjusted Lease Balance is:

(a) *$18,780.00* less (b) the sum of (1) all depreciation amounts received by you to date plus (2) one Base Payment, Item 3.A.

20. Although not so identified in *Exhibit A*, the $18,780 is what is commonly referred to in the automobile leasing business as the "initial capitalized cost." It represents the assumed purchase price of the vehicle used in computing the other figures in the lease.

21. Item 3.A., also referred to in Item 16, is entitled "Base Payment" and is $227.29.

22. Item 15 provides as follows:

VEHICLE VALUATION AT EARLY TERMINATION

My termination liability in the event of early termination will be affected by the Realized Value of the vehicle. The Realized Value may be determined in one of the following ways:

(a) Within ten (10) days after I return the vehicle, you and I may enter into a written agreement as to the vehicle's value, should I request it, or I may obtain a professional appraisal of the wholesale value of the vehicle made by a qualified person I find, who is acceptable to

you as well as to me. I agree that the expense for any such appraisal will be mine.

(b) If the Realized Value is not determined as above within ten (10) days after return of the vehicle, you will attempt to obtain three bids to purchase the vehicle at wholesale for cash or may establish the Realized Value in some other commercially reasonable manner. I will have the right to submit a written bid which you agree to consider together with all other binds you may receive. Even though you may decide not to sell the vehicle to any bidder, the highest bona fide bid received (which is supported by whatever proof of ability to pay you may require) will be considered the vehicle's Realized Value.

I understand and agree that the realized Value amount will be exclusive of any official fees and taxes imposed upon the disposition of the vehicle.

23. The following terms necessary to determine a number from the early termination/default formula are not defined or explained anywhere in *Exhibit A*:

a. The "depreciation and lease charge portions" of each payment, which differ with each payment.

b. How "lease charges" are "earned by you on a constant yield basis in relation to the Adjusted Lease Balance as it declines during the lease term."

c. The "rate which provides a constant yield throughout the lease term."

d. What are the "rules for journal entries for lessors as to direct financing leases contained in Statement of Financial Accounting Standards No. 13."

Unreasonable Nature of Default/ Termination Charges

24. For multiple reasons, the provisions in *Exhibit A* dealing with default/early termination charges are calculated to produce charges which are unreasonable and not related to any actual or anticipated harm from default or early termination.

25. First, Security Pacific has a policy and practice of using an initial capitalized cost that is greatly in excess of the actual market price of the vehicle. The actual purchase price of the 1988 Peugeot, after a discount off the list price and a manufacturer's rebate, was $15,995. Plaintiff selected dealer installed options with a total list price of $535, for a total of not more than $16,530. However, in *Exhibit A* Security Pacific uses a figure of not less than $18,780. In addition, plaintiff paid $3,000 cash upon entering into the lease, for a total of $21,780.

26. Since all depreciation calculations are based on this inflated "purchase price," the lessee's liability upon early termination is inflated as well.

27. The default/early termination formula in *Exhibit A* then credits the consumer with the "Realized Value" of the vehicle.

28. The manner of determining the "Realized Value" of the vehicle specified in the lease is not commercially reasonable.

29. Furthermore, use of the amount realized by selling the vehicle at wholesale is not a reasonable method of determining the consumer's liability because the entire justification for leasing a vehicle, as opposed to buying it and trading it in, is to relieve the consumer from the risk of realizing a poor price when the vehicle is disposed of.

30. The combined effect of the steps described in ¶¶ 16-29, above, is to create a convoluted and difficult-to-understand procedure which is grossly unfavorable to consumers and guarantees that the early termination charges will be far in excess of "an amount which is reasonable in the light of the anticipated or actual harm caused by the . . . early termination . . . ."

Excess Mileage Charges

31. *Exhibit A* also provided for an "excess mileage charge" of 10 cents per mile for each mile the vehicle was driven monthly in excess of 1,250 miles. Item 9 of *Exhibit A* provided:

> EXCESS MILEAGE CHARGE
>
> I understand that you have based the Total Monthly Lease Payment on normal wear and tear and, unless indicated otherwise below, on the assumption that I will drive the vehicle an average of 15,000 miles (standard mileage) or less each year. I agree that, if I drive the vehicle in excess of the standard or other intended mileage, whichever is applicable, and if I do not purchase the vehicle at the scheduled end of the term of this lease, I will pay an excess mileage charge of ten (10) cents per mile for each mile the vehicle is driven in excess of the standard or other intended mileage.

32. The Truth in Leasing Act and implementing regulations and Staff Commentary require that the lease contain "reasonable standards" for determining excess wear and usage. 12 C.F.R. 213.4(g)(8); Staff Commentary 213.4(g)(8)1.

33. The "excess mileage" charges in *Exhibit A* are grossly excessive. The impact of excess mileage on a used vehicle is substantially less than 10 cents per mile.

Classwide Disclosure Violations

34. The form of contract and disclosure statement represented by *Exhibit A* does not comply with the disclosure requirements under the Truth in Leasing Act and Regulation M for the following reasons, among others:

a. Security Pacific's statement that the lessee has no right to terminate voluntarily is, on information and belief, untrue, in that Security Pacific does allow voluntary early ter-

mination of automobile leases written on the printed form represented by *Exhibit A*.

b. *Exhibit A* does not clearly and conspicuously disclose charges for default/early termination. It is impossible for a non-accountant to calculate a number from the "disclosures" provided. The "rules for journal entries for lessors as to direct financing leases contained in Statement of Financial Accounting Standards No. 13" are neither provided by Security Pacific nor within the knowledge of the average consumer. The lease also does not disclose the "depreciation and lease charge portions" of each payment, which differ with each payment; how "lease charges" are "earned by you on a constant yield basis in relation to the Adjusted Lease Balance as it declines during the lease term," or the "rate which provides a constant yield throughout the lease term," all of which must be known in order to apply the default/early termination formula.

c. In addition, the default/early termination formula requires repeated references to other items in the lease, further confusing the consumer.

d. One of the cross-references, Item 16(b), is to "any other amounts arising from my failure to keep my promises under this lease." This cross-reference could incorporate the mileage limitation (which triggers excess mileage charges) or the agreement to return the vehicle without "excess wear and tear." if those "promises" are among those incorporated, the default/early termination formula is further rendered unreasonable because the mileage and condition of the vehicle is reflected in the "Realized Value."

e. The warranty disclosure in Exhibit A (Item 19) states:

> VEHICLE WARRANTIES AND DISCLAIMERS.
>
> To the extent they are assignable, you agree to assign to me all of your rights and remedies under any warranties applicable to the vehicle which have been made by its manufacturers. I ACKNOWLEDGE THAT YOU MAKE

> NO EXPRESS WARRANTIES REGARDING THE VEHICLE, THAT I AM LEASING IT FROM YOU "AS IS", AND THAT THE ENTIRE RISK AS TO THE QUALITY AND PERFORMANCE OF THE VEHICLE IS WITH ME. In the event of a dispute regarding the manufacturer's warranty, I agree to use the manufacturer's dispute resolution system before taking any other action. I will continue making all of the payments required under this lease in the event of such a dispute. Unless this waiver is prohibited by law, I agree that I may not withhold payments from you and I agree that my payments under this lease are not subject to any defense, set-off, counterclaim or recoupment related to claims I may have against the manufacturer, the dealer if this lease has been assigned to an unrelated company, or any other entity not a party to this lease.

This disclosure does not "identify" any express warranties or indicate where they may be found, as required by 12 C.F.R. § 213.4(g)(7). Moreover, the disclosure is inaccurate and incomplete in any case where an extended warranty is sold.

f. The statement in Item 19 requiring resort to any dispute resolution mechanism maintained by the manufacturer substantially limits the consumer's rights and is inconsistent with the assignment of "all of [lessor's] rights and remedies under any warranties applicable to the vehicle which have been made by its manufacturer."

g. The disclosure of the purchase option in Item 8 is unclear and confusing because it refers to a term ("adjusted lease balance") which is not contained in Item 8. There is no reference to where the consumer may find it elsewhere in the lease.

Class Action Allegations

35. This action is brought on behalf of a class consisting of all persons who signed leases with Security Pacific Automotive

Financial Services Corporation using forms similar to *Exhibit A*, which leases do not have the three boxes at the end labelled "corporation," "partnership" and "sole proprietor" checked.

36. Ms. Lundquist alleges on information and belief that the class is so numerous that joinder of all members is impractical. This allegation is based on the fact that the lease signed by Ms. Lundquist, *Exhibit A*, is a standard printed form that was used in numerous transactions.

37. There are questions of law and fact common to the class, which common issues predominate over any issues involving only individual class members. The principal issues are:

a. Whether the charges for early termination, delinquency and default in *Exhibit A* comply with the substantive restrictions on such charges imposed by the Truth in Leasing Act.

b. Whether *Exhibit A* complies with the disclosure requirements of the Truth in Leasing Act.

c. Whether the charges for early termination, delinquency and default in *Exhibit A* are unenforceable penalties under state law.

d. Whether the imposition of unreasonable charges that are not disclosed in accordance with applicable disclosure requirements is an unfair and deceptive practice within the meaning of state statutes prohibiting unfair and deceptive practices in consumer transactions.

38. Ms. Lundquist's claims are typical of those of the class members. All are based on the same lease provisions and similar legal theories.

39. Ms. Lundquist will fairly and adequately protect the interests of the class. She has retained counsel experienced in handling class actions and actions involving unlawful business practices, including claims under the Truth in Leasing Act.

Neither Ms. Lundquist nor her counsel have any interests which might cause them not to vigorously pursue this action.

40. Certification of a class under Fed.R.Civ.P. 23(b)(2) is appropriate, in that defendant has enforced a common policy against the entire class, and declaratory and injunctive relief halting the injury inflicted by that policy is appropriate.

41. Alternatively, or in addition, certification of a class under Fed.R.Civ.P. 23(b)(3) is appropriate. A class action is superior, and indeed essential, for the fair and efficient adjudication of this dispute. The amount in controversy for each class member, and the complexity of the litigation, are such that individual litigation is not economically feasible. In the absence of a class action, many individual class members will be subjected to harm amounting to thousands of dollars, without redress.

COUNT I—CLASS CLAIM FOR IMPOSITION OF UNREASONABLE TERMINATION CHARGES IN VIOLATION OF TRUTH IN LEASING ACT

42. Plaintiff incorporates ¶¶ 1-33 and 35-41.

43. Security Pacific Automotive Financial Services Corporation has promulgated unreasonable and unlawful default/early termination charges through the use of *Exhibit A*, in violation of 15 U.S.C. § 1667b(b).

44. A dispute exists between Ms. Lundquist and the class, on the one hand, and Security Pacific Automotive Financial Services Corporation, on the other, concerning the validity of these termination charges.

WHEREFORE, the Court should enter judgment in favor of Ms. Lundquist and the class and against Security Pacific Automotive Financial Services Corporation granting the following relief:

a. The amounts specified in 15 U.S.C. § 1640.

b. Declaring that the default/early termination charges in the form represented by *Exhibit A* are unlawful and unenforceable, and requiring a refund of all default/early termination charges that have been collected from the class members.

c. Attorney's fees, litigation expenses and costs.

d. Such other or further relief as the Court deems appropriate.

COUNT II—CLASS CLAIM FOR DISCLOSURE VIOLATIONS UNDER TRUTH IN LEASING ACT

45. Ms. Lundquist incorporates ¶¶ 1-23 and 34-41.

46. By reason of the disclosure violations specified in ¶ 34, Security Pacific Automotive Financial Services Corporation is liable under 15 U.S.C. § 1640.

WHEREFORE, the Court should enter judgment in favor of Ms. Lundquist and the class and against Security Pacific Automotive Financial Services Corporation granting the following relief:

a. The amounts specified in 15 U.S.C. § 1640.

b. Declaring that the default/early termination charges in the form represented by *Exhibit A* are unlawful and unenforceable, and requiring a refund of all default/early termination charges that have been collected from the class members.

c. Attorney's fees, litigation expenses and costs.

d. Such other or further relief as the Court deems appropriate.

COUNT III—CLASS CLAIM FOR DECLARATORY RELIEF UNDER STATE LAW

47. Plaintiff incorporates ¶¶ 1-33.

48. The default and early termination charges specified in *Exhibit A* are unenforceable penalties under state law.

49. A dispute exists between Ms. Lundquist and the class, on the one hand, and Security Pacific Automotive Financial Services Corporation, on the other, concerning the validity of these termination charges.

WHEREFORE, the Court should enter judgment in favor of Ms. Lundquist and against Security Pacific Automotive Financial Services Corporation granting the following relief:

a. Declaring that the default/early termination charges in the form represented by *Exhibit A* are unlawful and unenforceable, enjoining the collection of default/ early termination charges from the class members, and requiring a refund of all such charges that have been collected from the class members.

b. Awarding costs.

c. Granting such other or further relief as the Court deems appropriate.

COUNT IV—CLASS CLAIM FOR UNFAIR AND DECEPTIVE ACTS AND PRACTICES

50. Plaintiff incorporates ¶¶ 1-49.

51. At all times during which Security Pacific Automotive Financial Services Corporation used the form of which *Exhibit A* is an example, each state had in force a statute, modelled after the Federal Trade Commission Act, prohibiting unfair and deceptive acts and practices ("UDAP") in connection with consumer transactions. The Connecticut statute is Connecticut Gen. Stat. Ann. § 42-110a. After determining the state where the practices complained of were devised and implemented,

plaintiff may request application of the statute of that state to the entire class.

52. Security Pacific Automotive Financial Services Corporation's imposition of unreasonable termination charges that are not properly disclosed as required by the Truth in Leasing Act constitutes an unfair and deceptive practice.

53. The violations complained of were committed for pecuniary gain, and with knowledge of probable illegality.

54. A dispute exists between Ms. Lundquist and the class, on the one hand, and Security Pacific Automotive Financial Services Corporation, on the other, concerning the validity of these termination charges.

WHEREFORE, the Court should enter judgment in favor of Ms. Lundquist and the class and against Security Pacific Automotive Financial Services Corporation granting the following relief:

a. Declaring that the default/early termination charges in the form represented by *Exhibit A* are unlawful and unenforceable, enjoining the collection of default/early termination charges from the class members, and requiring a refund of all such charges that have been collected from the class members.

b. Awarding statutory and punitive damages in an amount sufficient to deter further violations of law.

c. Attorney's fees, litigation expenses and costs.

d. Such other or further relief as the Court deems appropriate.

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CONSUMER LEASING ACT OF 1976

§ 1667. Definitions

For purposes of this part—

(1) The term "consumer lease" means a contract in the form of a lease or bailment for the use of personal property by a natural person for a period of time exceeding four months, and for a total contractual obligation not exceeding $25,000, primarily for personal, family, or household purposes, whether or not the lessee has the option to purchase or otherwise become the owner of the property at the expiration of the lease, except that such term shall not include any credit sale as defined in section 1602(g) of this title. Such term does not include a lease for agricultural, business or commercial purposes, or to a government or governmental agency or instrumentality, or to an organization.

(2) The term "lessee" means a natural person who leases or is offered a consumer lease.

(3) The term "lessor" means a person who is regularly engaged in leasing, offering to lease, or arranging to lease under a consumer lease.

(4) The term "personal property" means any property which is not real property under the laws of the State where situated at the time offered or otherwise made available for lease.

(5) The terms "security" and "security interest" mean any interest in property which secures payment or performance of an obligation.

(Pub.L. 90-321, Title I, § 181, as added Pub.L. 94-240, § 3, Mar. 23, 1976, 90 Stat. 257.)

§ 1667a. Consumer lease disclosures

Each lessor shall give a lessee prior to the consummation of the lease a dated written statement on which the lessor and

lessee are identified setting out accurately and in a clear and conspicuous manner the following information with respect to that lease, where applicable:

(1) A brief description or identification of the leased property;

(2) The amount of any payment by the lessee required at the inception of the lease;

(3) The amount paid or payable by the lessee for official fees, registration, certificate of title, or license fees or taxes;

(4) The amount of other charges payable by the lessee not included in the periodic payments, a description of the charges and that the lessee shall be liable for the differential, if any, between the anticipated fair market value of the leased property and its appraised actual value at the termination of the lease, if the lessee has such liability;

(5) A statement of the amount or method of determining the amount of any liabilities the lease imposes upon the lessee at the end of the term and whether or not the lessee has the option to purchase the leased property and at what price and time;

(6) A statement identifying all express warranties and guarantees made by the manufacturer or lessor with respect to the leased property, and identifying the party responsible for maintaining or servicing the leased property together with a description of the responsibility;

(7) A brief description of insurance provided or paid for by the lessor or required of the lessee, including the types and amounts of the coverages and costs;

(8) A description of any security interest held or to be retained by the lessor in connection with the lease and a clear identification of the property to which the security interest relates;

(9) The number, amount and due dates or periods of payments under the lease and the total amount of such periodic payments;

(10) Where the lease provides that the lessee shall be liable for the anticipated fair market value of the property on expiration of the lease, the fair market value of the property at the inception of the lease, the aggregate cost of the lease on expiration, and the differential between them; and

(11) A statement of the conditions under which the lessee or lessor may terminate the lease prior to the end of the term and the amount or method of determining any penalty or charge for delinquency, default, late-payments, or early termination.

The disclosures required under this section may be made in the lease contract to be signed by the lessee. The Board may provide by regulation that any portion of the information required to be disclosed under this section may be given in the form of estimates where the lessor is not in a position to know exact information.

(Pub.L. 90-321, Title I, § 182, as added Pub.L. 94-240, § 3, Mar. 23, 1976, 90 Stat. 258.)

§ 1667b. Lessee's liability on expiration or termination of lease

Estimated residual value of property as basis; presumptions; action by lessor for excess liability; mutually agreeable final adjustment

(a) Where the lessee's liability on expiration of a consumer lease is based on the estimated residual value of the property such estimated residual value shall be a reasonable approximation of the anticipated actual fair market value of the property on lease expiration. There shall be a rebuttable presumption that the estimated residual value is unreasonable to the extent that the estimated residual value exceeds the actual residual value by more than three times the average payment

allocable to a monthly period under the lease. In addition, where the lessee has such liability on expiration of a consumer lease there shall be a rebuttable presumption that the lessor's estimated residual value is not in good faith to the extent that the estimated residual value exceeds the actual residual value by more than three times the average payment allocable to a monthly period under the lease and such lessor shall not collect from the lessee the amount of such excess liability on expiration of a consumer lease unless the lessor brings a successful action with respect to such excess liability. In all actions, the lessor shall pay the lessee's reasonable attorney's fees. The presumptions stated in this section shall not apply to the extent the excess of estimated over actual residual value is due to physical damage to the property beyond reasonable wear and use, or to excessive use, and the lease may set standards for such wear and use if such standards are not unreasonable. Nothing in this subsection shall preclude the right of a willing lessee to make any mutually agreeable final adjustment with respect to such excess residual liability, provided such an agreement is reached after termination of the lease.

Penalties and charges for delinquency, default, or early termination

(b) Penalties or other charges for delinquency, default, or early termination may be specified in the lease but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the delinquency, default, or early termination, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy.

Independent professional appraisal of residual value of property at termination of lease; finality

(c) If a lease has a residual value provision at the termination of the lease, the lessee may obtain at his expense, a professional appraisal of the leased property by an independent

third party agreed to by both parties. Such appraisal shall be final and binding on the parties.

(Pub.L. 90-321, Title I, § 183, as added Pub.L. 94-240, § 3, Mar. 23, 1976, 90 Stat. 259.)

§ 1667c. Consumer lease advertising; liability of advertisers

(a) No advertisement to aid, promote, or assist directly or indirectly any consumer lease shall state the amount of any payment, the number of required payments, or that any or no downpayment or other payment is required at inception of the lease unless the advertisement also states clearly and conspicuously and in accordance with regulations issued by the Board of each of the following items of information which is applicable:

(1) That the transaction advertised is a lease.

(2) The amount of any payment required at the inception of the lease or that no such payment is required if that is the case.

(3) The number, amounts, due dates or periods of scheduled payments, and the total payments under the lease.

(4) That the lessee shall be liable for the differential, if any, between the anticipated fair market value of the leased property and its appraised actual value at the termination of the lease, if the lessee has such liability.

(5) A statement of the amount or method of determining the amount of any liabilities the lease imposes upon the lessee at the end of the term and whether or not the lessee has the option to purchase the leased property and at what price and time.

(b) There is no liability under this section on the part of any owner or personnel, as such, of any medium in which an advertisement appears or through which it is disseminated.

(Pub.L. 90-321, Title I, § 184, as added Pub.L. 94-240, § 3, Mar. 23, 1976, 90 Stat. 259.)

§ 1667d. Civil liability of lessors

Grounds for maintenance of action

(a) Any lessor who fails to comply with any requirement imposed under section 1667a or 1667b of this title with respect to any person is liable to such person as provided in section 1640 of this title.

Additional grounds for maintenance of action; definition

(b) Any lessor who fails to comply with any requirement imposed under section 1667c of this title with respect to any person who suffers actual damage from the violation is liable to such person as provided in section 1640 of this title. For the purposes of this section, the term "creditor" as used in sections 1640 and 1641 of this title shall include a lessor as defined in this part.

Jurisdiction of courts; time limitation

(c) Notwithstanding section 1640(e) of this title, any action under this section may be brought in any United States district court or in any other court of competent jurisdiction. Such actions alleging a failure to disclose or otherwise comply with the requirements of this part shall be brought within one year of the termination of the lease agreement.

(Pub.L. 90-321, Title I, § 185, as added Pub.L. 94-240, § 3, Mar. 23, 1976, 90 Stat. 260, and amended Pub.L. 96-221, Title VI, § 624, Mar. 31, 1980, 94 Stat. 185.)

§ 1667e. Applicability of State laws; exemptions by Board from leasing requirements

(a) This part does not annul, alter, or affect, or exempt any person subject to the provisions of this part from complying with, the laws of any State with respect to consumer leases, except to the extent that those laws are inconsistent with any provision of this part, and then only to the extent of the incon-

sistency. The Board is authorized to determine whether such inconsistencies exist. The Board may not determine that any State law is inconsistent with any provision of this part if the Board determines that such law gives greater protection and benefit to the customer.

(b) The Board shall by regulation exempt from the requirements of this part any class of lease transactions within any State if it determines that under the law of that State that class of transactions is subject to requirements substantially similar to those imposed under this part or that such law gives greater protection and benefit to the consumer, and that there is adequate provision for enforcement.

(Pub.L. 90-321, Title I, § 186, as added Pub.L. 94-240, § 3, Mar. 23, 1976, 90 Stat. 260.)

12 C.F.R. §§ 213.1-213.8
Part 213—CONSUMER LEASING

Sec.

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SUPPLEMENT I-CL-1 TO PART 213—OFFICIAL STAFF COMMENTARY TO REGULATION M

AUTHORITY: 15 U.S.C. 1604.

SOURCE: Reg. M, 46 FR 20951, Apr. 7, 1981, unless otherwise noted.

§ 213.1 General provisions.

(a) *Authority.* This regulation, known as Regulation M, is issued by the Board of Governors of the Federal Reserve System to implement the consumer leasing portions of the Truth in Lending Act, which is title I of the Consumer Credit Protection Act, as amended (15 U.S.C. 1601 *et seq.*)

(b) *Purpose.* The purpose of this regulation is to assure that lessees of personal property are given meaningful disclosure of lease terms, to delimit the ultimate liability of lessees in leasing personal property and to require meaningful and accurate disclosures of lease terms in advertising.

(c) *Enforcement and liability.* Section 108 of the Act contains the administrative enforcement provisions. Sections 112, 130, 131 and 185 of the Act contain the liability provisions for failing to comply with the requirements of the act and this regulation.

(d) *Issuance of staff interpretations.* (1) Officials in the Board's Division of Consumer and Community Affairs are authorized to issue official staff interpretations of this regulation. Official staff interpretations provide the formal protection provided under section 130(f) of the Act.

(2) A request for an official staff interpretation shall be in writing and addressed to the Director, Division of Consumer and Community Affairs, Board of Governors of the Federal Reserve System, Washington, D.C. 20551. The request shall contain a complete statement of all relevant facts concerning the issue, including copies of all pertinent documents.

(3) No staff interpretations will be issued approving lessor's forms, statements, calculation tools, or methods. This restriction does not apply to forms, statements, tools, or methods whose use is required or sanctioned by a governing agency.

§ 213.2 Definitions and rules of construction.

(a) *Definitions.* For the purposes of this regulation, unless the context indicates otherwise, the following definitions apply:

(1) *Act* means the Truth in Lending Act (15 U.S.C. 1601 *et seq.*).

(2) *Advertisement* means any commercial message in any newspaper, magazine, leaflet, flyer or catalog, on radio, television or public address system, in direct mail literature or other printed material on any interior or exterior sign or display, in any window display, in any point-of-transaction literature or price tag which is delivered or made available to lessee or prospective lessee in any manner whatsoever.

(3) *Agricultural purpose* means a purpose related to the production, harvest, exhibition, marketing, transportation, pro-

cessing, or manufacture of agricultural products by a natural person who cultivates, plants, propagates, or nurtures those agricultural products, including but not limited to the acquisition of personal property and services used primarily in farming. *Agricultural products* includes agricultural, horticultural, viticultural, and dairy products, livestock, wildlife, poultry, bees, forest products, fish and shellfish, and any products thereof, including processed and manufactured products, and any and all products raised or produced on farms and any processed or manufactured products thereof.

(4) *Arrange for lease of personal property* means to provide or offer to provide a lease which is or will be extended by another person under a business or other relationship pursuant to which the person arranging such lease:

(i) Receives or will receive a fee, compensation, or other consideration for such service; or

(ii) Has knowledge of the lease terms and participates in the preparation of the contract documents required in connection with the lease.

(5) *Board* refers to the Board of Governors of the Federal Reserve System.

(6) *Consumer lease* means a contract in the form of a bailment or lease for the use of personal property by a natural person primarily for personal, family or household purposes, for a period of time exceeding four months, for a total contractual obligation not exceeding $25,000, whether or not the lessee has the option to purchase or otherwise become the owner of the property at the expiration of the lease. It does not include a lease which meets the definition of a credit sale in Regulation Z, 12 CFR 226.2(a) nor does it include a lease for agricultural, business or commercial purposes or one made to an organization.

(7) *Lessee* means a natural person who leases under, or who is offered a consumer lease.

(8) *Lessor* means a person who, in the ordinary course of business regularly leases, offers to lease, or arranges for the leasing of personal property under a consumer lease.

(9) *Organization* means a corporation, trust, estate, partnership, cooperative, association, government, or governmental subdivision, agency or instrumentality.

(10) *Period* means a day, week, month, or other subdivision of a year.

(11) *Person* means a natural person or an organization.

(12) *Personal property* means any property which is not real property under the law of the state where it is located at the time it is offered or made available for lease.

(13) *Real property* means property which is real property under the law of the state in which it is located.

(14) *Realized value* means (i) the price received by the lessor for the leased property at disposition, (ii) the highest offer for disposition, or (iii) the fair market value at the end of the lease term.

(15) *Security interest* and *security* mean any interest in property which secures payment or performance of an obligation. The terms include, but are not limited to, security interests under the Uniform Commercial Code, real property mortgages, deeds of trust, and other consensual or confessed liens whether or not recorded, mechanic's, materialman's, artisan's, and other similar liens, vendor's liens in both real and personal property, any lien on property arising by operation of law, and any interest in a lease when used to secure payment or performance of an obligation.

(16) *State* means any state, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(17) *Total lease obligation* equals the total of (i) the scheduled periodic payments under the lease, (ii) any nonrefundable cash payment required of the lessee or agreed upon by the

lessor and lessee or any trade-in allowance made at consummation, and (iii) the estimated value of the leased property at the end of the lease term.

(18) *Value at consummation* equals the cost to the lessor of the leased property including, if applicable, any increase or markup by the lessor prior to consummation.

(b) *Rules of construction.* For purposes of this regulation, the following rules of construction apply:

(1) Unless the context indicates otherwise, *lease* shall be construed to mean *consumer lease.*

(2) A transaction shall be considered consummated at the time a contractual relationship is created between the lessor and the lessee, irrespective of the time of the performance of either party.

(3) Captions and catchlines are intended solely as aids to convenient reference, and no inference as to the intent of any provisions may be drawn from them.

[46 FR 20951, Apr. 7, 1981; 46 FR 29245, June 1, 1981]

§ 213.3 Exempted transactions.

This regulation does not apply to lease transactions of personal property which are incident to the lease of real property and which provide that (a) the lessee has no liability for the value of the property at the end of the lease term except for abnormal wear and tear, and (b) the lessee has no option to purchase the leased property.

§ 213.4 Disclosures.

(a) *General requirements.* (1) Any lessor shall, in accordance with this regulation and to the extent applicable, make the disclosures required by paragraph (g) of this section with respect to any consumer lease. Such disclosures shall be made clearly, conspicuously, in meaningful sequence, and in accordance with the further requirements of this section. All numerical amounts and percentages shall be stated in figures and

shall be printed in not less than the equivalent of 10 point type, .075 inch computer type, or elite size typewritten numerals, or shall be legibly handwritten.

(2) Disclosures shall be made prior to the consummation of the lease on a dated written statement which identifies the lessor and the lessee, and a copy of the statement shall be given to the lessee at the time. All of the disclosures shall be made together on either (i) the contract or other instrument evidencing the lease on the same page and above the place for the lessee's signature; or (ii) a separate statement which identifies the lease transaction.

(3) In any lease of multiple items, the description required by paragraph (g)(1) of this section may be provided on a separate statement or statements which are incorporated by reference in the disclosure statement required by paragraph (a) of this section.

(4) All disclosures required to be given by the regulation shall be made in the English language except in the Commonwealth of Puerto Rico, where disclosures may be made in the Spanish language with English language disclosures provided upon the customer's request, either in substitution for the Spanish disclosures or as additional information in accordance with paragraph (b) of this section.

(b) *Additional information.* At the lessor's option, additional information or explanations may be supplied with any disclosure required by this regulation, but none shall be stated, utilized, or placed so as to mislead or confuse the lessee or contradict, obscure or detract attention from the information required to be disclosed. Any lessor who elects to make disclosures specified in any provision of State law which, under § 213.7 of this regulation, is inconsistent with the requirements of the act and this regulation may—

(1) Make such inconsistent disclosures on a separate paper apart from the disclosures made pursuant to this regulation; or

(2) Make such inconsistent disclosures on the same statement on which disclosures required by this regulation are made, provided:

(i) All disclosures required by this regulation appear separately and above any other disclosures,

(ii) Disclosures required by this regulation are identified by a clear and conspicuous heading indicating that they are made in compliance with federal law, and

(iii) All inconsistent disclosures appear separately and below a conspicuous demarcation line, and are identified by a clear and conspicuous heading indicating that statements made thereafter are inconsistent with the disclosure requirements of the Federal Consumer Leasing Act.

(c) *Multiple lessors; multiple lessees.* When a transaction involves more than one lessor, only one lessor need make the disclosures required by this regulation, and the one that discloses shall be the one chosen by the lessors. When a lease involves more than one lessee, the disclosures may be made to any lessee who is primarily liable on the lease.

(d) *Unknown information estimate.* If, at the time disclosures must be made, an amount or other item of information required to be disclosed, or needed to determine a required disclosure, is unknown or not available to the lessor and the lessor has made a reasonable effort to ascertain it, the lessor may use an estimated amount or an approximation of the information, provided the estimate or approximation is clearly identified as such, is reasonable, is based on the best information available to the lessor, and is not used for the purpose of circumventing or evading the disclosure requirements of this regulation. Notwithstanding the requirement of this paragraph that the estimate be based on the best information available, a lessor is not precluded in a purchase option lease from understating the estimated value of the leased property at the end of the term in computing the total lease obligation as required in paragraph (g)(15)(i) of this section.

(e) *Effect of subsequent occurrence.* If information required to be disclosed in accordance with this regulation is subsequently rendered inaccurate as a result of any act, occurrence, or agreement subsequent to the delivery of the required dis-

closures, the inaccuracy resulting therefrom does not constitute a violation of this regulation.[1]

(f) *Leap year.* Any variance in any term required under this regulation to be disclosed or stated in any advertisement, which occurs by reason of the addition of February 29 in each leap year, may be disregarded, and such term may be disclosed or stated without regard to such variance.

(g) *Specific disclosure requirements.* In any lease subject to this section, the following items, as applicable, shall be disclosed:

(1) A brief description of the leased property, sufficient to identify the property to the lessee and lessor.

(2) The total amount of any payment, such as a refundable security deposit paid by cash, check or similar means, advance payment, capitalized cost reduction or any trade-in allowance, appropriately identified, to be paid by the lessee at the consummation of the lease.

(3) The number, amount and due dates or periods of payments scheduled under the lease and the total amount of such periodic payments.

(4) The total amount paid or payable by the lessee during the lease term for official fees, registration, certificate of title, license fees, or taxes.

(5) The total amount of all other charges, individually itemized, payable by the lessee to the lessor, which are not included in the periodic payments. This total includes the amount of any liabilities the lease imposes upon the lessee at the end of the term, but excludes the potential difference between the esti-

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1 Such acts, occurrences, or agreements include the failure of the lessee to perform his obligations under the contract and such actions by the lessor as may be proper to protect his interests in such circumstances. Such failure may result in the liability of the lessee to pay delinquency charges, collection costs, or expenses of the lessor for perfection or acquisition of any security interest or amounts advanced by the lessor on behalf of the lessee in connection with insurance, repairs to, or preservation of leased property.

mated and the realized values, required to be disclosed under paragraph (g)(13) of this section.

(6) A brief identification of insurance in connection with the lease including (i) if provided or paid for by the lessor, the types and amounts of coverages required by the lessee, or (ii) if not provided or paid for by the lessor, the types and amounts of coverages required of the lessee.

(7) A statement identifying any express warranties or guarantees available to the lessee made by the lessor or manufacturer with respect to the leased property.

(8) An identification of the party responsible for maintaining or servicing the leased property together with a brief description of the responsibility, and a statement of reasonable standards for wear and use, if the lessor sets such standards.

(9) A description of any security interest, other than a security deposit disclosed under paragraph (g)(2) of this section, held or to be retained by the lessor in connection with the lease and a clear identification of the property to which the security interest relates.

(10) The amount or method of determining the amount of any penalty or other charge for delinquency, default, or late payments.

(11) A statement of whether or not the lessee has the option to purchase the leased property and, if at the end of the lease term, at what price, and, if prior to the end of the lease term, at what time, and the price or method of determining the price.

(12) A statement of the conditions under which the lessee or lessor may terminate the lease prior to the end of the lease term and the amount or method of determining the amount of any penalty or other charge for early termination.

(13) A statement that the lessee shall be liable for the difference between the estimated value of the property and its realized value at early termination or the end of the lease term, if such liability exists.

(14) Where the lessee's liability at early termination or at the end of the lease term is based on the estimated value of the leased property, a statement that the lessee may obtain at the end of the lease term or at early termination, at the lessee's expense, a professional appraisal of the value which could be realized at sale of the leased property by an independent third party agreed to by the lessee and the lessor, which appraisal shall be final and binding on all parties.

(15) Where the lessee's liability at the end of the lease term is based upon the estimated value of the leased property:

(i) The value of the property at consummation of the lease, the itemized total lease obligation at the end of the lease term, and the difference between them.

(ii) That there is a rebuttable presumption that the estimated value of the leased property at the end of the lease term is unreasonable and not in good faith to the extent that it exceeds the realized value by more than three times the average payment allocable to a monthly period, and that the lessor cannot collect the amount of such excess liability unless the lessor brings a successful action in court in which the lessor pays the lessee's attorney's fees, and that this provision regarding the presumption and attorney's fees does not apply to the extent the excess of estimated value over realized value is due to unreasonable wear or use, or excessive use.

(iii) A statement that the requirements of paragraph (g)(15)(ii) of this section do not preclude the right of a willing lessee to make any mutually agreeable final adjustment regarding such excess liability.

(h) *Renegotiations or extensions.* If any existing lease is renegotiated or extended, such renegotiation or extension shall be considered a new lease subject to the disclosure requirements of this regulation, except that the requirements of this paragraph shall not apply to (1) a lease of multiple items where a new item(s) is provided or a previously leased item(s) is returned, and the average payment allocable to a monthly period is not changed by more than 25 percent, or (2) a lease

which is extended for not more than 6 months on a month-to-month basis or otherwise.

§ 213.5 Advertising.

(a) *General rule.* No advertisement to aid, promote, or assist directly or indirectly any consumer lease may state that a specific lease of any property at specific amounts or terms is available unless the lessor usually and customarily leases or will lease such property at those amounts or terms.

(b) *Catalogs and multi-page advertisements.* If a catalog or other multiple-page advertisement sets forth or gives information in sufficient detail to permit determination of the disclosures required by this section in a table or schedule of lease terms, such catalog or multiple-page advertisement shall be considered a single advertisement provided:

(1) The table or the schedule and the disclosures made therein are set forth clearly and conspicuously; and

(2) Any statement of lease terms appearing in any place other than in that table or schedule of lease terms clearly and conspicuously refers to the page or pages on which that table or schedule appears, unless that statement discloses all of the lease terms required to be stated under this section.

(c) *Terms that require additional information.* No advertisement to aid, promote, or assist directly or indirectly any consumer lease shall state the amount of any payment, the number of required payments, or that any or no downpayment or other payment is required at consummation of the lease unless the advertisement also states clearly and conspicuously each of the following items of information, as applicable:

(1) That the transaction advertised is a lease.

(2) The total amount of any payment such as a security deposit or capitalized cost reduction required at the consummation of the lease, or that no such payments are required.

(3) The number, amounts, due dates or periods of scheduled payments, and the total amount of such payments under the lease.

(4) A statement of whether or not the lessee has the option to purchase the leased property and at what price and time. The method of determining the price may be substituted for disclosure of the price.

(5) A statement of the amount or method of determining the amount of any liabilities the lease imposes upon the lessee at the end of the term and a statement that the lessee shall be liable for the difference, if any, between the estimated value of the leased property and its realized value at the end of the lease term, if the lease has such liability.

(d) *Multiple item leases; merchandise tags.* If a merchandise tag for an item normally included in a multiple item lease sets forth information which would require additional disclosures under paragraph (c) of this section, such merchandise tag need not contain such additional disclosures, provided it clearly and conspicuously refers to a sign or display which is prominently posted in the lessor's showroom. Such sign or display shall contain a table or schedule of those items of information to be disclosed under paragraph (c) of this section.

[46 FR 20951, Apr. 7, 1981; 46 FR 29245, June 1, 1981]

§ 213.6 Preservation and inspection of evidence of compliance.

(a) Evidence of compliance with the requirements imposed under this regulation, other than advertising requirements under § 213.5, shall be preserved by the lessor for a period of not less than 2 years after the date such disclosure is required to be made.

(b) Each lessor shall, when directed by the appropriate administrative enforcement authority designated in section 108 of the Act, permit that authority or its duly authorized repre-

sentative to inspect its relevant records and evidence of compliance with this regulation.

§ 213.7 Inconsistent state requirements.

(a) *Preemption.* A state law which is similar in nature, purpose, scope, intent, effect, or requisites to a section of chapter 5 of the Act is not inconsistent with the Act or this regulation within the meaning of section 186(a) of the Act if the lessor can comply with the State law without violating this regulation. If a lessor cannot comply with a State law without violating a provision of this regulation which implements a section of chapter 5 of the Act, such State law is inconsistent with the requirements of the Act and this regulation within the meaning of section 186(a) of the Act and is preempted.

(b) *Procedures.* A state, through its governor, attorney general or other appropriate official having primary enforcement or interpretative responsibilities for its consumer leasing law, may apply to the Board for a determination that the State law offers greater protection and benefit to lessees than a comparable provision(s) of chapter 5 of the Act and its implementing provision(s) in this regulation, or is otherwise not inconsistent with chapter 5 of the Act and this regulation, or for a determination with respect to any issues not clearly covered by paragraph (a) of this section as to the consistency or inconsistency of a State law with chapter 5 of the Act or its implementing provisions in this regulation.

§ 213.8 Exemption of certain state regulated transactions.

(a) *Exemption for State regulated transactions.* In accordance with the provisions of appendix A to Regulation M, part 213, any state may make application to the Board for exemption of any class of transactions within the state from the requirements of chapter 5 of the Act and the corresponding provisions of this regulation, provided that:

(1) The Board determines that under the law of that state, that class of transactions is subject to requirements substan-

tially similar to those imposed under chapter 5 of the Act and the corresponding provisions of this regulation; or the lessee is afforded greater protection and benefit than is afforded under chapter 5 of the Act, and

(2) There is adequate provision for enforcement.

(b) *Procedures and criteria.* The procedures and criteria under which a state may apply for the determination provided for in paragraph (a) of this section are set forth in appendix A to Regulation M.

(c) *Civil liability.* In order to assure that the concurrent jurisdiction of Federal and state courts created in sections 130(e) and 185(c) of the Act shall continue to have substantive provisions to which such jurisdiction shall apply, and generally to aid in implementing the Act with respect to any class of transactions exempted pursuant to paragraph (a) of this section and appendix A, the Board pursuant to sections 105 and 186(b) of the Act hereby prescribes that:

(1) No such exemptions shall be deemed to extend to the civil liability provisions of sections 130, 131, and 185 of the Act; and

(2) After an exemption has been granted, the disclosure requirements of the applicable state law shall constitute the disclosure requirements of the Act, except to the extent that such state law imposes disclosure requirements not imposed by the Act. Information required under such state law with the exception of those provisions which impose disclosure requirements not imposed by the Act shall, accordingly, constitute a "requirement imposed" under chapter 5 of the Act for the purpose of section 130(a).

SUPPLEMENT I-CL-1 TO PART 213—OFFICIAL STAFF COMMENTARY TO REGULATION M

Introduction

1. *Official status.* This commentary is the vehicle by which the staff of the Division of Consumer and Community Affairs of the Federal Reserve Board issues official staff interpretations of Regulation M, effective April 1, 1981. Good faith compliance with this commentary affords protection from liability under section 130(f) of the Truth in Lending Act (15 U.S.C. 1640). Section 130(f) protects lessors from civil liability for any act done or omitted in good faith in conformity with any interpretation issued by a duly authorized official or employee of the Federal Reserve System.

2. *Procedures for requesting interpretations.* Under § 213.1(d) of the regulation, anyone may request an official staff interpretation. Interpretations that are adopted will be incorporated in this commentary following publication in the FEDERAL REGISTER. No official staff interpretations are expected to be issued other than by means of this commentary.

3. *Status of previous interpretations.* All statements and opinions issued by the Federal Reserve Board and its staff interpreting previous Regulation Z remain effective until October 1, 1982, only insofar as they interpret that regulation. When compliance with Regulation M becomes mandatory on October 1, 1982, the Board and staff interpretations of the previous Regulation Z leasing provisions will be entirely superseded by Regulation M and this commentary, except with regard to liability under the previous regulation.

4. *Rules of construction.* (a) Lists that appear in the commentary may be exhaustive or illustrative; the appropriate construction should be clear from the context. In most cases, illustrative lists are introduced by phrases such as "including, but not limited to," "among other things," "for example," or "such as."

(b) Throughout the commentary and regulation, reference to the regulation should be construed to refer to Regulation M, unless the context indicates that a reference to previous Regulation Z (12 CFR part 226) is also intended.

(c) Throughout the commentary, reference to *this section* or *this paragraph* means this section or paragraph in the regulation that is the subject of the comment.

5. *Comment designations.* Each comment in the commentary is identified by a number and the regulatory section or paragraph that it interprets. The comments are designated with as much specificity as possible according to the particular regulatory provision addressed. For example, some of the comments to § 213.4(a) are further divided by subparagraph, such as comment 4(a)(1)-1 and comment 4(a)(1)-2. In other cases, comments have more general application and are designated, for example, as comment 4(a)-1. This introduction may be cited as comments I-1 through I-6. The appendices may be cited as comments app. C-1 and app. C-2.

6. *Cross-references.* The following cross-references to related material appear at the end of each section of the commentary: (a) *Statute*—those sections of the Truth in Lending Act on which the regulatory provision is based;

(b) *Other sections*—other provisions in the regulation necessary to understand that section;

(c) *Previous regulation*—parallel provisions in previous Regulation Z; and

(d) *1981 changes*—a brief description of the major regulatory changes made when the leasing rules were moved from previous Regulation Z to Regulation M.

Section 213.1—General Provisions

1. *Foreign applicability.* Regulation M applies to all persons (including branches of foreign banks or leasing companies located in the United States) that offer consumer leases to res-

idents (including resident aliens) of any state as defined in § 213.2(a)(16). The regulation does not apply to a foreign branch of a U.S. bank or leasing company leasing to a U.S. citizen residing or visiting abroad or to a foreign national abroad.

2. *Issuance of staff interpretations.* This commentary is the method by which the staff provides interpretations that afford formal protection under section 130(f) of the act. This commentary may be amended periodically.

References:

Statute: Sections 102(b), 105, and 130(f).
Previous regulation: Section 226.1.
1981 changes: None.

Section 213.2—Definitions and Rules of Construction

2(a) Definitions.
2(a)(2) Advertisement.

1. *Coverage.* Only commercial messages that promote consumer lease transactions requiring disclosures are advertisements. Messages inviting, offering, or otherwise announcing generally to prospective customers the availability of consumer leases, whether in visual, oral, or print media, are covered by the definition. The list of examples in the definition is not exhaustive; telephone solicitations and letters sent to customers as part of an organized solicitation of business, for example, are also advertisements. The term does *not* include the following:

• Direct personal contacts, such as follow up letters, cost estimates for individual lessees, or oral or written communications relating to the negotiation of a specific transaction.

• Informational material distributed only to business.

• Notices required by federal or state law, if the law mandates that specific information be displayed and only the information so mandated is included in the notice.

• News articles, the use of which is controlled by the news medium.

• Market research or educational materials that do not solicit business.

2. *Persons covered.* See the commentary to § 213.5(a).

2(a)(4) Arrange for lease of personal property.

1. *General.* The definition of lessor in § 213.2(a)(8) includes one who, in the ordinary course of business, regularly arranges for the leasing of personal property. For example:

• An automobile dealer who, pursuant to a business relationship, completes the necessary lease agreement before forwarding it to the leasing company (to whom the obligation is payable on its face) for execution is *arranging* for the lease.

• An automobile dealer who, receiving no fee for the service, refers a customer to a leasing company that will prepare all relevant contract documents is not *arranging* for the lease.

2. *Multiple lessors.* See the commentary to § 213.4(c).

3. *Consideration.* The term *other consideration* refers to an actual payment corresponding to a fee or similar compensation. It does not refer to intangible benefits, such as the advantage of increased business, that may flow from the relationship between the parties.

2(a)(6) Consumer lease.

1. *Primary purposes.* A lessor must determine in each case if the leased property will be used primarily for personal, family, or household purposes. If some question exists as to the primary purpose for a lease, the lessor is, of course, free to make the disclosures, and the fact that disclosures are made in such circumstances is not controlling on the question of whether the transaction was exempt. The primary purpose of a lease is generally determined before or at consummation and a subsequent charge in primary usage is governed by § 213.4(e).

2. *Period of time.* To be a consumer lease, the initial term of the lease must be more than 4 months. Thus, a lease of personal property for 4 months, 3 months or on a month-to-month or week-to-week basis (even though the lease actually extends

beyond 4 months) is not a consumer lease and is not subject to the disclosure requirements of the regulation. A lease with a penalty for cancelling during the first 4 months is considered to have a term of more than 4 months. A month-to-month or week-to-week extension of a lease that was originally for 4 months or less is not a consumer lease, even if the extension actually lasts for more than 4 months. For example, a 3-month lease extended on a month-to-month basis and terminated after 1 year does not require consumer lease disclosures.

3. *Organization.* A consumer lease does not include a lease made to an organization, as defined in § 213.2(a)(9). A lease to an organization is outside the requirements of the regulation even if the property is used (by an employee, for example) primarily for personal, family or household purposes. Likewise, a lease made to an organization is not a consumer lease even if it is guaranteed by or subsequently assigned to a natural person.

4. *Credit sale.* A lease that meets the definition of a credit sale in Regulation Z, 12 CFR 226.2(a)(16), is not a consumer lease. Regulation Z defines a credit sale, in part, as "a bailment or lease (unless terminable without penalty at any time by the consumer) under which the consumer—

(i) Agrees to pay as compensation for use a sum substantially equivalent to, or in excess of, the total value of the property and services involved; and

(ii) Will become (or has the option to become), for no additional consideration or ~~for~~ nominal consideration, the owner of the property upon compliance with the agreement."

5. *Safe deposit boxes.* A lease of a safe deposit box is not a consumer lease for purposes of this regulation.

6. *Leases of personal property incidental to a service.* The following leases of personal property that are incidental to services are not consumer leases subject to the requirements of the regulation:

• Home entertainment systems requiring the consumer to lease equipment that enables a television to receive the transmitted programming.

• Burglar alarm systems requiring the installation of leased equipment that triggers a telephone call when a home is burglarized.

2(a)(7) Lessee.

1. *Guarantors.* Guarantors are not lessees for purposes of the regulation.

2(a)(8) Lessor.

1. *Assignees.* An assignee may be a lessor for purposes of the regulation in circumstances such as those described in "Ford Motor Credit Co. v. Cenance," 452 U.S. 155, 101 S.Ct. 2239 (1981). In that case, the Supreme Court held that an assignee was a creditor for purposes of previous Regulation Z because of its substantial involvement in the credit transaction.

2(a)(9) Organization.

1. *Coverage.* The term includes joint ventures and persons operating under a business name.

2(a)(12) Personal property.

1. *Coverage.* Whether property is considered personal property depends on state or other applicable law. For example, a mobile home or houseboat may be considered personal property in one state but real property in another.

2(a)(14) Realized value.

1. *General.* Realized value is not a required disclosure. It refers to the value of the property at early termination or at the end of the lease term. It may be either the retail or wholesale value. Realized value is relevant only to leases in which the lessee's liability at early termination or at the end of the lease term is the difference between the estimated value of the property and its realized value.

2. *Options.* Subject to the contract and to state or other applicable law, the lessor may choose any of the 3 methods for calculating the realized value in determining the lessee's liability at the end of the lease term or at early termination. If the lessor sells the property prior to making that determination, the price received for the property is the realized value. If the lessor does not sell the property prior to making that determination, the lessor may choose either the highest offer or the fair market value as the realized value.

3. *Exclusions.* The realized value may exclude any amount attributable to taxes.

4. *Disposition charges.* Disposition charges may not be subtracted in determining the realized value. If the lessor charges the lessee a fee to cover the disposition expenses, the fee must be disclosed at consummation under § 213.4(g)(5). Disposition charges may be estimated in accordance with § 213.4(d), and this does not prevent the lessor from collecting the actual disposition costs incurred.

5. *Offers.* In determining the highest offer for disposition, the lessor need not consider offers that the offeror has withdrawn or is unable or unwilling to perform.

6. *Appraisals.* The lessor may obtain an appraisal of the leased property to determine its realized value. Such an appraisal, however, is not the one addressed in section 183(c) of the Act and § 213.4(g)(14); those provisions refer to the lessee's right to an independent professional appraisal.

2(a)(15) Security interest.

1. *Coverage.* The list of security interests in the definition is not exhaustive. Other than those listed, only interests that are security interests under state or other applicable law are encompassed by the definition. For example, any interest the lessor may have in the leased property falls within this definition only if it is considered a security interest under state or other applicable law.

2. *Disclosable interests.* For purposes of the regulation, a security interest is an interest taken by the lessor to secure performance of the lessee's obligation. For example, if a bank that it not a lessor makes a loan to a leasing company and takes assignments of consumer leases generated by that company to secure the loan, the bank's security interest in the lessor's receivables is not a security interest for purposes of this regulation.

3. *Insurance.* The lessor's right to insurance proceeds or unearned insurance premiums is not a security interest for purposes of this regulation.

2(a)(17) Total lease obligation.

1. *Disclosure.* The total lease obligation is disclosed under § 213.4(g)(15)(i). It is relevant only to so-called open-end leases in which the lessee's liability at the end of the lease term is based on the difference between the estimated value of the leased property and its realized value.

2. *Periodic payments: disclosure distinguished.* Certain items that may be paid periodically are not part of the lessee's total lease obligation. Therefore, the amount of the scheduled periodic payments for purposes of calculating the total lease obligation may be less than the amount of the periodic payments disclosed under § 213.4(g)(3).

3. *Periodic payments: inclusions and exclusions.* The total of scheduled periodic payments under the lease for purposes of calculating the total lease obligation is composed of the following items:

- Any portion of the periodic payments attributable to depreciation, cost of money, and profit.

- Taxes in some cases. See the commentary to § 213.4(g)(15).

- The capitalized cost of mechanical breakdown protection contracts.

The total of scheduled periodic payments under the lease for purposes of calculating the total lease obligation does *not* include the following:

- Any amount not paid periodically.
- Any portion of periodic payments attributable to official fees, registration, certificate of title, or license fees.
- Taxes in some cases. See the commentary to § 213.4(g)(15).

At the lessor's option, the capitalized cost of service contracts and insurance premiums may be either included or excluded from this calculation.

4. *Initial payments*. the following amounts are *not* included among the payments at consummation when calculating the total lease obligation:

- Refundable security deposits.
- Official fees and charges disclosable under § 213.4(g)(4).
- *Other charges* disclosable under § 213.4(g)(5).
- The cost of a mechanical breakdown protection contract purchases at consummation.

5. *Estimated value*. See the commentary to § 213.4(d) regarding the use of estimates and section 183(a) of the Act regarding the criteria for estimating the value of the leased property at the end of the lease term.

2(a)(18) Value at consummation.

1. *Disclosure*. The value at consummation is relevant only to so-called open-end leases and is disclosed and subtracted from the total lease obligation under § 213.4(g)(15)(i).

2. *Taxes* The value at consummation includes taxes paid by the lessor in connection with the acquisition of leased property and amortized over the lease term. See the commentary to § 213.4(g)(15).

3. *Other amounts.* The definition of the value at consummation explicitly permits the lessor to include a profit or markup (without separate itemization). The lessor may include costs of doing business, such as insurance that the lessor purchases on its own behalf. See the commentary to § 213.4(g)(6). The lessor may not include in this amount other items (such as maintenance or extended warranty insurance) that are purchased by the lessee.

2(b) Rules of construction.

1. *Footnotes.* Material that appears in a footnote has the same legal weight as material in the body of the regulation.

2. *Consummation.* When a contractual relationship is created between the lessor and the lessee is a matter to be determined under state or other applicable law; the regulation does not make that determination. Consummation does not occur merely because the lessee has made some financial investment in the transaction (for example, by paying a nonrefundable fee) unless, of course, applicable law holds otherwise.

References

Statute: Sections 103(g) and 181.
Previous regulation: Section 226.2.
1981 changes: Agricultural purpose has been slightly revised to conform to the amended act.

Section 213.3—Exempted Transactions

References

Statute: Section 105(a).
Previous regulation: Section 226.3(f).
1981 changes: None.

Section 213.4—Disclosures

4(a) General requirements.

1. *Basis of disclosures.* The regulation assumes that parties will perform fully according to the lease terms. For example:

• In a 3-year lease with a 1-year minimum term after which there is no penalty for termination, disclosures should be based on the full 3-year term of the lease. The 1-year minimum term is only relevant to the early termination provisions of § 213.4(g)(12), (13), and (14).

2. *Minor variations.* The lessor may disregard the effects of the following in making calculations and disclosures:

• That payments must be collected in whole cents.

• That dates of scheduled payments may be changed because the scheduled date is not a business day.

• That months have different numbers of days.

3. *Form of disclosures.* In making disclosures lessors may cross-reference rather than repeat items that are disclosed elsewhere in the lease disclosure statement. In addition, when a required disclosure consists of a single charge, lessors do not have to repeat the charge as an itemization and a total amount. See the commentary to § 213.4(g)(5) and (15).

4. *Number of transactions.* Lessors have flexibility in handling lease transactions that may be viewed as multiple transactions. For example:

• When a lessor leases two items to the same lessee on the same day, the lessor may disclose the leases as either one or two lease transactions.

• When a lessor sells insurance or other incidental services in connection with a lease, the lessor may disclose in one of two ways: a single lease transaction or a lease and credit sale transaction.

5. *Rebates.* In a lease transaction, a seller's or manufacturer's rebate may be offered to prospective lessees. At the lessor's option, these rebates may be either reflected in or disregarded in the lease disclosures required under the regulation. If the lessor chooses to reflect the rebate in the leasing disclosures, it may be taken into account in any manner as part of those disclosures.

Paragraph 4(a)(1).

1. *Clearly, conspicuously and in meaningful sequence.* This standard requires that disclosures be in a reasonably understandable form. For example, while the regulation requires no particular mathematical progression or format, the disclosures must be presented in a way that does not obscure the relationship of the terms to each other. Appendix C contains model forms that meet this standard, although lessors are not required to use these forms. The requirement that disclosures be made clearly and conspicuously does no mean that they must be more conspicuous than other terms in a combined contract-disclosure statement, nor does it preclude the use of a multi-purpose disclosure form that enables the lessor to designate the specific disclosures applicable to a given transaction. See the commentary to appendix C.

2. *Type size.* The term *point* in the phrase *10-point type* is a printing term that refers to the size of the body of the type, as distinguished from the size of the type face which may vary among different print manufacturers.

Paragraph 4(a)(2).

1. *Consummation.* See the commentary to § 213.2(b).

2. *Identification of parties.* While disclosures must always be made clearly and conspicuously, it is not necessary to use the words *lessor* or *lessee* when identifying those parties.

3. *Multiple lessors and multiple lessees.* In transactions involving multiple lessors and lessees, the disclosure statement must identify all the lessors and lessees; however, § 213.4(c) permits a single lessor to make all the disclosures to a single lessee.

4. *Integrated lease/disclosure forms.* Contract terms or disclosures that are not required by the regulation may be added to the disclosure statement so long as the required disclosures are made together on a single page (which may include both sides) and above the place for the lessee's signature. Generally, other terms and disclosures may precede, follow, or be intermingled

with the regulation's disclosures within the limits of § 213.4(b) governing the use of additional information and the clear, conspicuous, and meaningful sequence disclosure standard in § 213.4(a)(1).

5. *Lessee's signature.* The regulation does not require the lessee to sign the disclosures but, if disclosures are combined with contract terms, the lessor may require the lessee's signature for contract or evidentiary purposes. In such a case, the disclosures must be made above the place for the lessee's signature. When disclosures and contract terms appear on both sides of a page, the consumer's signature usually appears on the bottom of the second side. For purposes of the regulation, the consumer's signature may appear on the bottom of the first side if all the disclosures appear on that side.

Paragraph 4(a)(4).

1. *Permissible uses.* If the lessor chooses to provide foreign-language translations of the disclosures or is required to do so by state, federal, or local law, the translations are not inconsistent per se with disclosures under the regulation and may be provided as additional information under § 213.4(b).

2. *Advertisements in Puerto Rico.* The requirement for providing English disclosures upon request does not apply to advertisements subject to § 213.5 of the regulation.

4(b) Additional information.

1. *State law disclosures.* If state law disclosures are not inconsistent with the act and regulation under § 213.7, the lessor may make those disclosures in accordance with the first sentence of this paragraph. If state law disclosures are inconsistent under § 213.7 and the lessor elects to make them, it must do so in accordance with the second sentence of this paragraph.

4(c) Multiple lessors; multiple lessees.

1. *Multiple lessors.* If a lease transaction involves more than one lessor, the lessors may choose which of them will make the disclosures. All disclosures for the transactions must be given,

even if the disclosing lessor would not otherwise have been obligated to make a particular disclosure.

4(d) Unknown-information estimate.

1. *Time of estimated disclosure.* The lessor may use estimates to make disclosures if necessary information is unknown or unavailable at the time the disclosures are made. For example:

• Section 213.4(g)(4) requires the lessor to disclose the total amount payable by the lessee during the lease term for official fees, registration, certificate of title, license fees, or taxes. If these amounts are subject to indeterminable increases or decreases over the course of the lease, the lessor may estimate its disclosures based on the rates or charges in effect at the time of disclosure.

2. *Basis of estimates.* Estimates must be made on the basis of the best information reasonably available at the time disclosures are made. The *reasonably available* standard requires that the lessor, acting in good faith, exercise due diligence in obtaining information. The lessor normally may rely on the representations of other parties in obtaining information. For example, the lessor might look to the consumer to determine the purpose for which leased property will be used, to insurance companies for the cost of insurance, or to an automobile manufacturer or dealer for the date of delivery.

3. *Estimated value of leased property at termination.* When the lessee's liability at the end of the lease term is based on the estimated value of the leased property (see § 213.4(g)(15)), the estimate must be reasonable and based on the best information reasonably available to the lessor. That standard permits a lessor to use a generally accepted trade publication listing estimated current or future market prices for leased property, rather than investing in the most sophisticated computer equipment to derive the estimated value at the end of the lease term. The lessor should rely on other information, its experience, or reasonable belief, if those sources provide the best information. For example:

• An automobile lessor offering a 3-year open-end lease intends to assign a wholesale value to the vehicle at the end of the lease term. The lessor may disclose as an estimated value a wholesale value derived from a credible trade publication listing current wholesale values, if the trade publication is the best information available.

• Same facts as above, except that the lessor discloses an estimated value derived by adjusting the value quoted in the trade publication because, in its experience, the trade publication values either understate or overstate the prices actually received in local used vehicle markets. The lessor may adjust estimated values quoted in trade publications based on the lessor's experience or reasonable belief that such values will be understated or overstated.

4. *Retail or wholesale value.* The lessor may choose either a retail or a wholesale value in estimating the value of the leased property at termination, provided that choice is consistent with the lessor's general practice or intention when determining the value of the property at the end of the lease term.

5. *Labelling estimates.* Generally, only the particular disclosure for which the exact information is unknown is labelled as an estimate. However, when several disclosures are affected because of the unknown information, the lessor has the option of labelling as an estimate either every affected disclosure or only the disclosure primarily affected.

6. *Understating the estimated value.* In non-purchase-option leases, the lessor may not use a value lower than that indicated by the best information available when disclosing the estimated value of leased property at the end of the lease term under § 213.4(g)(15).

4(e) Effect of subsequent occurrence.

1. *Subsequent occurrences.* Examples of subsequent occurrences include:

• A change from a monthly to a weekly payment schedule.

• The addition of insurance or a security interest by the lessor because the lessee has not performed obligations contracted for in the lease.

• An increase in official fees or taxes. See the commentary to § 213.4(d).

• An increase in insurance premium or coverage caused by a change in law.

• Late delivery of an automobile caused by a strike.

2. *Redisclosure.* When a disclosure becomes inaccurate because of a subsequent occurrence, the lessor need not make new disclosures unless new disclosures are required under § 213.4(h).

4(g) Specific disclosure requirements.

1. *Inapplicable disclosures.* The disclosures required by this section need be made only as applicable. Any disclosure not relevant to a particular transaction may be eliminated entirely. For example, if the lessor does not take a security interest, no disclosure is required under § 213.4(g)(9). See the commentary to appendix C.

2. *Other required disclosures.* The disclosure statement must include the date and identify the lessor and the lessee. See the commentary to § 213.4(a)(2). The lessor need only be identified by name; no address is required.

Paragraph 4(g)(1).

1. *Multiple-item lease.* In a multiple-item lease, the property may be described in separate statements as provided in § 213.4(a)(3).

Paragraph 4(g)(2).

1. *Itemization not required.* The lessor must disclose one total initial payment amount and identify the components of this one amount (for example, capitalized cost reduction, mechanical breakdown protection, registration fees). The lessor may, but need not, disclose the dollar amount of each component.

2. *Consummation.* See the commentary to § 213.2(b).

3. *Fees payable upon delivery.* This provision does not apply to fees paid at delivery, when delivery occurs after consummation. For example:

• The lessee agrees to pay registration fees, sales taxes, and a delivery charge in one lump sum on the date the automobile is delivered, some time after consummation. None of these charges is an initial payment under § 213.4(g)(2) because they are paid after consummation of the lease. The registration fees and sales taxes are disclosed under § 213.4(g)(4), and the delivery charge is disclosed as an *other charge* under § 213.4(g)(5).

Paragraph 4(g)(3).

1. *Itemization not required.* Section 213.4(g)(3) does not require the lessor to itemize the components of the periodic payments. Some of the components must be disclosed separately if their disclosure is required by other provisions of the regulation, such as official fees and lessee's insurances.

2. *Periodic payments.* The phrase *number, amount and due dates or periods of payments* requires the disclosure of all payments made periodically. The disclosed payments must include all amounts, such as maintenance and insurance charges, that are paid periodically. In addition, the lessor must disclose the total of such periodic payments. In an open-end lease, however, the lessor may disclose as the total of periodic payments the sum of the scheduled periodic payments referred to in § 213.2(a)(17). See the commentary to § 213.2(a)(17).

Paragraph 4(g)(4).

1. *Taxes.* Taxes that are included in the value at consummation are not disclosed pursuant to this paragraph. See the commentary to § 213.2(a)(18).

Paragraph 4(g)(5).

1. *Coverage.* Section 213.4(g)(5) requires the disclosure of charges that are anticipated by the parties as incident to the normal operation of the lease agreement. It does not require

disclosure of charges that are imposed when the lessee terminates early or fails to abide by the lease agreement, such as charges for:

- Late payment.
- Default.
- Early termination.
- Deferral of payments.
- Extension of the lease.

2. *Form of disclosure.* Although the disclosure of an other charge or the total of all other charges must be clear and conspicuous, the lessor need not use the specific terminology *other charge*. Moreover, the regulation does not impose a location requirement for the disclosure of other charges. For example:

- A lessor has a single other charge, which is a disposition fee of $100. The lessor may disclose the disposition fee with related disclosures about early or scheduled termination. It may but need not repeat the charge as a total with the label of *other charge* or show a total of other charges.

3. *Relationship to other provisions.* The other charges mentioned in § 213.4(g)(5) are charges that are not required to be disclosed under another provision of § 213.4(g). For example:

- A delivery charge that is paid after consummation is disclosed as an *other charge*. A delivery charge that is paid at consummation, however, is disclosed as part of the total initial charges under § 213.4(g)(2), not as an *other charge*.

- Occasionally, the price of a mechanical breakdown protection (MBP) contract is disclosed as an *other charge*. More often, the price of MBP is reflected in the periodic payment disclosure under § 213.4(g)(3), in which case it is not disclosed as an *other charge*. In states where MBP is regarded as insurance, however, the cost should be disclosed in accordance with § 213.4(g)(6), not as an *other charge*. See the commentary to § 213.4(g)(6).

4, *Lessee liabilities at the end of the lease term.* Liabilities that the lease imposes upon the lessee at the end of the scheduled lease term and that must be disclosed include, but are not limited to, disposition and *pick-up* charges.

Paragraph 4(g)(6).

1. *Lessor's insurance.* Insurance that is purchased by the lessor primarily for its own benefit, and that is absorbed as a business expense and not separately charged to the lessee, need not be disclosed under § 213.4(g)(6) even if it provides an incidental benefit to the lessee.

2. *Mechanical breakdown protection.* Whether mechanical breakdown protection (MBP) purchased in conjunction with a lease should be treated as insurance is determined by state or other applicable law. In states that do not treat MBP as insurance, the lessor need not make § 213.4(g)(6) disclosures. The lessor may, however, disclose the § 213.4(g)(6) information in such case in accordance with the additional information provision in § 213.4(b).

Paragraph 4(g)(7).

1. *Brief identification.* The statement identifying warranties may be brief. For example, manufacturer's warranties may be identified simply by a reference to the standard manufacturer's warranty.

2. *Warranty disclaimers.* Although a disclaimer of warranties is not required by the regulation, the lessor may give a disclaimer as additional information in accordance with § 213.4(b).

3. *State law.* Whether an express warranty or guaranty exists is determined by state or other applicable law.

Paragraph 4(g)(8).

1. *Standards for wear and use.* The lessor is permitted, but not required, to set standards for wear and use (such as excess mileage). The disclosure may be omitted by lessors that do not set such standards. See the commentary to § 213.4(g)(15).

Paragraph 4(g)(9).

1. *Disclosable security interests.* See §213.2(a)(15) and accompanying commentary to determine what security interests must be disclosed.

Paragraph 4(g)(10).

1. *Collection costs.* The automatic imposition of collection costs or attorney fees upon default must be disclosed under § 213.4(g)(10). Collection costs or attorney fees that are not imposed automatically, but are contingent upon expenditure of amounts in conjunction with a collection proceeding or upon the employment of an attorney to effect collection, need not be disclosed.

2. *Charges for early termination.* When default is a condition for early termination of a lease, default charges much also be disclosed under § 213.4(g)(12). The § 213.4(g)(10) and (12) disclosures may be combined. Examples of combined disclosures are provided in the model lease disclosure forms in appendix C.

3. *Simple-interest leases.* In a simple-interest accounting lease, the additional lease charge that accrues on the lease balance when a periodic payment is made after the due date does not constitute a penalty or other charge for late payment. Similarly, continued accrual of the lease charge after termination of the lease because the lessee fails to return the leased property does not constitute a default charge. In either case, if the additional charge accrues at a rate higher than the normal lease charge, the lessor must disclose the amount of or the method of determining the additional charge under § 213.4(g)(10).

4. *Extension charges.* Extension charges that exceed the lease charge in a simple-interest accounting lease or that are added separately are disclosed under § 213.4(g)(10).

5. *Reasonableness of charges.* Penalties or other charges for delinquency, default, or early termination may be specified in the lease but only in an amount that is reasonable. Section

183(b) of the Act sets forth the standards for determining a reasonable penalty or charge.

Paragraph 4(g)(11).

1. *Mandatory disclosure of no purchase option.* Although generally the lessor need only make the specific required disclosures that apply to a transaction, it must disclose affirmatively that the lessee has no option to purchase the leased property when the purchase option is inapplicable.

2. *Existence of purchase option.* Whether a purchase option exists is determined by state or other applicable law. The lessee's right to submit a bid to purchase property at termination of the lease is not an option to purchase under § 213.4(g)(11) if the lessor is not required to accept the lessee's bid and the lessee does not receive preferential treatment.

3. *Purchase option fees.* A purchase option fee must be disclosed under this paragraph unless the lessor discloses the fee under § 213.4(g)(5) as an other charge.

Paragraph 4(g)(12).

1. *Default.* When default is also a condition for early termination of a lease, default charges must be disclosed under this paragraph. See the commentary to § 213.4(g)(10).

2. *Lessee's liability at early termination.* When the lessee is liable for the difference between the unamortized capitalized cost and the realized value at early termination, the amount or the method of determining the amount of the difference must be disclosed under this paragraph.

3. *Reasonableness of charges.* Penalties or other charges for delinquency, default, or early termination may be specified in the lease but only in an amount that is reasonable. Section 183(b) of the Act sets forth the standards for determining a reasonable penalty or charge.

Paragraph 4(g)(14).

1. *Disclosure inapplicable.* When the lessee is liable at the end of the lease term or at early termination for unreasonable

wear or use but *not* for the estimated value of the leased property, the lessor need not disclose the lessee's right to an independent appraisal. For example:

• The automobile lessor may reasonably expect a lessee to return an undented car with four good tires at the end of the lease term. Even though it holds the lessee liable for the difference between a dented car with bald tires and the value of a car in reasonably good repair, the lessor is not required to disclose the lessee's appraisal right.

2. *Lessor's appraisal.* The lessor may obtain an appraisal of the leased property to determine its realized value. Such an appraisal, however, is not the one addressed in section 183(c) of the Act, and the lessor still must disclose the lessee's independent right to an appraisal under § 213.4(g)(14).

3. *Time restriction on appraisal.* Neither the Act nor the regulation specified any time period in which the lessee must exercise the appraisal right. The lessor may require a lease to obtain the appraisal within a reasonable time after termination of the lease. The regulation does not define what is a *reasonable time.*

Paragraph 4(g)(15).

1. *Coverage.* The disclosure under Paragraph 4(g)(15) limiting the lessee's liability for the value of the leased property does not apply at early termination.

2. *Total lease obligation.* The requirement that the total lease obligation be itemized is satisfied by disclosing the 3 components in the definition of total lease obligation in § 213.2(a)(17) with their corresponding amounts. The lessor may cross-reference the individual components disclosed elsewhere in the lease disclosure statement, as done in appendix C-1.

3. *Taxes.* Taxes included in the value at consummation are included in the total lease obligation. Taxes not included in the value at consummation may, but need not, be included in the

total lease obligation at the lessor's option. See the commentary to § 213.2(a)(18).

4. *Leases with a minimum term.* If a lease has an alternative minimum term, the § 213.2(g)(15) disclosures governing the liability limitation are no applicable for the minimum term. See the commentary to § 213.4(a).

5. *Average payment allocable to a monthly period.* The phrase *average payment allocable to a monthly period* is based on the periodic payment used to compute the total lease obligation. See the commentary to § 213.2(a)(17).

6. *Charges not subject to rebuttable presumption.* The limitation on liability applies only to liability that is based on the estimated value of the property at the end of the lease term. The lessor also may recover additional charges from the lessee at the end of the lease term. Examples of such additional charges include:

- Disposition charges.
- Excess mileage charges.
- Late payment and default charges.
- Amounts by which the unamortized capitalized cost exceeds the estimated residual value that have accrued in simple interest accounting leases because the lessee has made late payments.

4(h) Renegotiations or extensions.

1. *General coverage.* Section 213.4(h) applies only to existing leases that were covered by the requirements of the regulation or previous Regulation Z. It therefore does not apply to the renegotiation or extension of leases with an initial term of 4 months or less, because such leases are not covered by the definition of consumer lease in § 213.2(a)(6).

3. *Renegotiation defined.* A renegotiation occurs when an existing consumer lease is satisfied and replaced by a new lease undertaken by the same lessee. A renegotiation is a new lease requiring new disclosures. Whether and when a lease is satis-

fied and replaced by a new lease is determined by state or other applicable law.

3. *Renegotiation exceptions.* The following events are not renegotiations even if they are accomplished by satisfying and replacing an existing lease:

• A substitution of leased property in a multiple-item lease, provided the average payment is not changed by more than 25 percent.

• A reduction in the lease charge.

• A substitution of leased property with property that has a substantially equivalent or greater economic value, provided no other lease terms are changed.

4. *Extension defined.* An extension is any continuation of an existing consumer lease beyond the originally scheduled termination date, but only if the continuation is not the result of a renegotiation. The continuation must be agreed to by both the lessor and the lessee. An extension that exceeds 6 months is a new lease requiring new disclosures.

5. *Time of extension disclosures.* If a consumer lease is extended for a specified term greater than 6 months, new disclosures are required at the time the extension is agreed to. If the lease is extended on a month-to-month basis and exceeds 6 months, new disclosures are required at the commencement of the seventh month. If a consumer lease is extended for several terms, one of which will exceed 6 months beyond the originally scheduled termination date of the lease, new disclosures are required at the commencement of the term that will exceed 6 months beyond the originally scheduled termination date.

6. *Inapplicable disclosures.* Disclosures that are inapplicable to the terms of a renegotiation or extension need not be given. For example:

• If the term for which extension disclosures are given is 1 month and the lessee will pay no official fees and taxed during that month, no disclosure of those amounts is necessary.

• If a renegotiation involves no initial charges, no disclosure of initial charges is necessary.

7. *Court proceedings.* No disclosures are required if a renegotiation or extension results from an agreement involving a court proceeding.

8. *Deferrals.* No disclosures are required if one or more payments are deferred, whether or not a fee is charged.

9. *Assumptions.* No disclosures are required when a consumer lease is assumed by another person, whether or not an assumption fee is charged.

References

Statute: Sections 102(b), 121, 122, 124, 182, and 183.
Other sections: Sections 213.2, 213.5, and 213.7 and appendix C.
Previous regulation: Sections 226.6 and 226.15.
1981 changes: Although reorganized, the disclosure requirements are substantially the same as the previous requirements. The sole amendment implements section 121 of the Truth in Lending Act pertaining to multiple lessors and lessees.

Section 213.5—Advertising

5(a) General rule.

1. *Persons covered.* All *persons* must comply with the advertising provisions in this section, not just those that meet the definition of lessor in § 213.2(a)(8). Thus, automobile dealers, merchants, and others who are not themselves lessors must comply with the advertising provisions of the regulation if they advertise consumer lease transactions. The owner and personnel of the medium in which an advertisement appears or through which it is disseminated, however, are not subject to civil liability for violations under section 184(b) of the act.

2. *Usually and customarily.* Section 213.5(a) is not intended to prohibit the advertising of a single item or the promotion of new leasing programs, but to bar the advertising of terms that are not and will not be available. Thus, an advertisement may

state terms that will be offered for only a limited period or terms that will become available at a future date.

5(b) Catalogs and multipage advertisements.

1. *General rule.* The multiple-page advertisements to which § 213.5(b) refers are advertisements consisting of a numbered series of pages—for example, a supplement to a newspaper. A mailing comprised of several separate flyers or pieces of promotional material in a single envelope is not a single multiple-page advertisement.

2. *Cross-references.* A multiple-page advertisement is a single advertisement (requiring only one set of lease disclosures) if it contains a table, chart, or schedule clearly stating sufficient information for the reader to determine the disclosures required under § 213.5(c) (1) through (5). If one of the triggering terms listed in § 213.5(c) appears on another page of the catalog or multiple-page advertisement, that page must clearly refer to the specific page where the table, chart, or schedule begins.

5(c) Terms that require additional information.

1. *Clear and conspicuous standard.* Section 213.5(c) prescribes no specific rules for the format of the necessary disclosures. The terms need not be printed in a certain type size and need not appear in any particular place in the advertisement.

2. *Triggering terms.* Whenever certain triggering terms appear in lease advertisements, the additional terms enumerated in § 213.5(c) (1) through (5) must also appear. An example of one or more typical leases with a statement of all the terms applicable to each may be used. The additional terms must be disclosed even if the triggering term is not stated explicitly, but is readily determinable from the advertisement. For example, if an advertisement states a 5-year lease term with monthly payments, the number of required payments—a triggering term—is readily apparent.

5(d) Multiple-item leases; merchandise tags.

1. *Merchandise tags.* Section 213.5(d) provides a method for using merchandise tags without including all the required disclosures on the tags. As an alternative to this disclosure method, a merchandise tag may state all the necessary terms on one or both sides of the tag. If the terms are on both sides of the tag, both sides must be accessible to the consumer.

References

Statute: Sections 105(a) and 184.
Other sections: Sections 213.2(a) (2) and (6).
Previous regulation: Sections 226.10 (a), (b), (g), and (h).
1981 changes: None.

Section 213.6—Preservation and Inspection of Evidence of Compliance

1. *Preservation methods.* Lessors must retain evidence that they performed required actions as well as made required disclosures. Adequate evidence of compliance does not require actual paper copies of disclosure statements or other business records. The evidence may be retained on microfilm, microfiche, or by any other method designed to reproduce records accurately (including computer programs). The lessor need retain only enough information to reconstruct the required disclosures or other records.

References

Statute: Section 105(a).
Previous regulation: Sections 226.6(i).
1981 changes: A uniform 2-year record-retention rule replaces the previous requirement that records be retained through at least one compliance examination.

Section 213.7—Inconsistent State Requirements

1. *Procedures.* Only states (through their authorized officials) may request and receive determinations on inconsistency. The procedures for requesting a Board determination on inconsistency are contained in Appendix B.

2. *Inconsistent state disclosures.* A lessor that chooses to make inconsistent state disclosures must do so in the manner prescribed by § 213.4(b).

References

Statute: Sections 111(a)(1) and 186(a).
Other sections: Sections 213.2(a)(16) and 213.4(b) and appendix B.
Previous regulation: Section 226.6(b)(3).
1981 changes: None.

Section 213.8—Exemption of Certain State-Regulated Transactions

1. *Classes eligible.* The state determines the classes of transactions for its exemption and makes its application for those classes. Classes might be, for example, all automobile leases or all leases in which the lessor is a bank.

2. *Substantial similarity.* The *substantially similar* standard requires that state statutory or regulatory provisions and state interpretations of those provisions must be generally the same as the federal act and the regulation. A state will be eligible for an exemption even if its law covers classes of transactions not covered by the federal law. For example, if a state's law covers leases for agricultural purposes, this will to prevent the Board from granting an exemption for consumer leases, even though leases for agricultural purposes are not covered by the federal law.

3. *Adequate enforcement.* The standard requiring adequate provision for enforcement generally means that appropriate state officials are authorized to enforce the state law through procedures and sanctions comparable to those available to federal enforcement agencies.

References

Statute: Sections 111(a)(2) and 186(b).
Other sections: Sections 213.2(a)(16) and 213.4(b) and Appendix A.

Previous regulation: Section 226.6(b)(3).
1981 changes: None.

APPENDIX A—PROCEDURES AND CRITERIA FOR STATE EXEMPTIONS

References

Statute: Section 186(b).
Other sections: Section 213.8.
Previous regulation: Section 226.80 (Supplement VI, Section I).
1981 changes: None.

APPENDIX B—PROCEDURES AND CRITERIA FOR BOARD DETERMINATION REGARDING PRE-EMPTION

References

Statute: Section 186(a).
Other sections: Section 213.7.
Previous regulation: Section 226.80 (Supplement VI, Section II).
1981 changes: None.

APPENDIX C—MODEL FORMS

1. *Permissible changes.* Although use of the model forms is not required, lessors using them properly will be deemed to be in compliance with the regulation. Lessors may make certain changes in the format or content of the forms and may delete any disclosures that are inapplicable to a transaction without losing the act's protection from liability. The changes to the model forms may not be so extensive as to affect the substance, clarity, or meaningful sequence of the forms. Examples of acceptable changes include:

- Using the first person, instead of the second person, in referring to the lessee.
- Using *lessee, lessor,* or names instead of pronouns.
- Rearranging the sequence of the disclosures.
- Incorporating certain state *plain English* requirements.

• Deleting inapplicable disclosures by whiting out, blocking out, filling in *N/A* (not applicable) or *O,* crossing out, leaving blanks, checking a box for applicable items, or circling applicable items. (This should permit use of multi-purpose standard forms.)

• Adding language or symbols to indicate estimates.

2. *Model open-end or finance vehicle lease disclosures.* Model C-1 is designed for an open-end or finance lease of a vehicle. An open-end or finance lease is one in which the lessee's liability at the end of the lease term is based on the difference between the estimated value of the leased property and its realized value. Section 213.4(g)(15)(i) requires disclosure of an itemized total lease obligation for such leases. To facilitate this disclosure, Model C-1 divides the initial charges (item 3) into two categories: Those that are included in the total lease obligation and those that are not. The amount of the monthly payment (item 4) is similarly divided. This format permits the components of the total lease obligation (item 11) to be disclosed simply by cross-reference to the previous items. See the commentary to § 213.2(a)(17). The inclusion of taxes in the basic monthly payment disclosure (mentioned in the instructions to item 4(a)) is not mandatory in all cases. See the commentary to § 213.4(g)(15).

3. *Model closed-end or net vehicle lease disclosures.* Model C-2 is designed for a closed-end or net lease of a vehicle. A closed-end or net lease is one in which the lessee's liability at the end of the lease term is *not* based on the difference between the estimated value of the leased property and its realized value. Item 13(c) is included for those closed-end vehicle leases in which the lessee's liability at early termination is based on the vehicle's estimated value. See § 213.4(g)(14).

4. *Model furniture lease disclosures.* Model C-3 is a closed-end lease disclosure statement designed for a typical furniture lease. It does not include a disclosure of the appraisal right at early termination that is required under § 213.4(g)(14) because few closed-end furniture leases base the lessee's liability at early termination on the estimated value of the leased property.

The disclosure may be added, if it is applicable, without loss of the form's protection from civil liability.

References

Statute: Sections 105, 130, and 185.

Previous regulation: Sections 226.1501, 226.1502, and 226.1503.

1981 changes: References in the instructions to the previous regulations have been deleted.

CONNECTICUT GENERAL STATUTES

§ 42-110a. Definitions

As used in this chapter:

(1) "Commissioner" means the commissioner of consumer protection;

(2) "Documentary material" means the original or a copy of a book, record, report, memorandum, paper, communication, tabulation, map, chart, photograph, mechanical transcription, or other tangible document or recording, wherever situate;

(3) "Person" means a natural person, corporation, trust, partnership, incorporated or unincorporated association, and any other legal entity; and

(4) "Trade" and "commerce" means the advertising, the sale or rent or lease, the offering for sale or rent or lease, or the distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value in this state.

(1973, P.A. 73-615, § 1, eff. July 1, 1973; 1978, P.A. 78-346, § 1.)

§ 42-110b. Unfair trade practices prohibited. Legislative intent

(a) No person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.

(b) It is the intent of the legislature that in construing subsection (a) of this section, the commissioner and the courts of this state shall be guided by interpretations given by the Federal Trade commission and the federal courts to Section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)), as from time to time amended.

(c) The commissioner may, in accordance with chapter 54, establish by regulation acts, practices or methods which shall be deemed to be unfair or deceptive in violation of subsection

(a) of this section. Such regulations shall not be inconsistent with the rules, regulations and decisions of the federal trade commission and the federal courts in interpreting the provisions of the Federal Trade Commission Act.

(d) It is the intention of legislature that this chapter be remedial and be so construed.

(1973, P.A. 73-615, § 2, eff. July 1, 1973; 1975, P.A. 75-618, § 1, eff. July 1, 1975; 1976, P.A. 76-303, § 1, eff. June 1, 1976.)

§ 42-110c. Exceptions

(a) Nothing in this chapter shall apply to: (1) Transactions or actions otherwise permitted under law as administered by any regulatory board or officer acting under statutory authority of the state or of the United States; or (2) acts done by the publisher, owner, agent or employee of a newspaper, periodical or radio or television station in the publication or dissemination of an advertisement, where the publisher, owner, agent or employee did not have knowledge of the false, misleading, unfair or deceptive character of the advertisement, and did not have direct financial interest in the sale or distribution of the advertised product or service.

(b) The burden of proving exemption, as provided in this section, from the provisions of this chapter shall be upon the person claiming the exemption.

(1973), P.A. 73-615, § eff. July 1, 1973; 1975, P.A. 75-618, § 2, eff. July 1, 1975; 1976, P.A. 76-303, § 2, eff. June 1, 1976.)

§ 42-110d. Investigation. Hearing. Orders. Enforcement. Disclosure of information

(a) For the purposes of this chapter the commissioner shall have the power to order an investigation and examination to be made. In addition to other powers conferred upon the commissioner by this chapter, the commissioner or his authorized representatives may issue subpoenas to any person involved in any matter under investigation and examination, administer an

oath or affirmation to any person, and conduct hearings in aid of any investigation or examination, provided none of the powers conferred by this chapter shall be used for the purpose of compelling any natural person to furnish testimony or evidence which might tend to incriminate him or subject him to a penalty or forfeiture.

(b) Said commissioner or his authorized representatives shall have the right to (1) enter any place or establishment within the state, at reasonable times, for the purpose of making an investigation; (2) check the invoices and records pertaining to costs and other transactions of commodities; (3) take samples of commodities for evidence upon tendering the market prices therefor to the person having such commodity in his custody; (4) subpoena documentary material relating to such investigation; and (5) have access to, for the purpose of examination, documentary material and the right to copy such documentary material of any person being investigated or proceeded against. The commissioner or his authorized representatives shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary material relating to any matter under investigation.

(c) In addition to other powers conferred upon the commissioner, said commissioner may execute in writing and cause to be served by certified mail an investigative demand upon any person suspected of using, having used or about use any method, act or practice declared by section 42-110b to be unlawful or upon any person from whom said commissioner wants assurance that section 42-110b has not, is not or will not be violated. Such investigative demand shall contain a description of the method, act or practices under investigation, provide a reasonable time for compliance, and require such person to furnish under oath or otherwise, as may be specified in said demand, a report in writing setting forth relevant facts or circumstances together with documentary material.

Text of subsection (d) effective until September 1, 1993.

(d) Said commissioner, in conformance with sections 4-176e to 4-185, inclusive, whenever he has reason to believe that any

person has been engaged or is engaged in an alleged violation of any provision of this chapter, shall mail to such person, by certified mail, a complaint stating the charges and containing a notice of a hearing, to be held upon a day and at a place therein fixed at least fifteen days after the date of such complaint. The person so notified shall have the right to file a written answer to the complaint and charges therein stated and appear at the time and place so fixed for such hearing, in person or otherwise, with or without counsel, and submit testimony and be fully heard. Any person may make application, and upon good cause shown shall be allowed by the commissioner to intervene and appear in such proceeding by counsel or in person. The testimony in any such proceeding, including the testimony of any intervening person, shall be under oath and shall be reduced to writing by the recording officer of the hearing and filed in the office of the commissioner. The commissioner or his authorized representatives shall have the power to require by subpoena the attendance and testimony of witnesses and the production of any documentary material at such proceeding. If upon such hearing the commissioner is of the opinion that he method of competition or the act or practice in question is prohibited by this chapter, the commissioner shall make a report in writing to the person complained of in which he shall state his findings as to the facts and shall forward by certified mail to such person an order to cease and desist from using such methods of competition of such act or practice, or, if the amount involved is less than two thousand dollars, an order directing restitution, or both. The commissioner may apply for the enforcement of any cease and desist order, order directing restitution or consent order. Such application for a temporary restraining order, temporary and permanent injunction, order directing restitution and for such other appropriate decree or process shall be brought and the proceedings thereon conducted by the attorney general.

Text of subsection (d) effective September 1, 1993.

(d) Said commissioner, in conformance with sections 4-176e to 4-185, inclusive, whenever he has reason to believe that any person has been engaged or is engaged in an alleged violation

of any provision of this chapter, shall mail to such person, by certified mail, a complaint stating the charges and containing a notice of hearing, to be held upon a day and a place therein fixed at least fifteen days after the date of such complaint. The person so notified shall have the right to file a written answer to the complaint and charges therein stated and appear at the time and place so fixed for such hearing, in person or otherwise, with or without counsel, and submit testimony and be fully heard. Any person may make application, and submit testimony and be fully heard. Any person may make application, and upon good cause shown shall be allowed by the commissioner to intervene and appear in such proceeding by counsel or in person. The testimony in any such proceeding, including the testimony of any intervening person, shall be under oath and shall be reduced to writing by the recording officer of the hearing and filed in the office of the commissioner. The commissioner or his authorized representatives shall have the power to require by subpoena the attendance and testimony of witness and the production of any documentary material at such proceeding. If upon such hearing the commissioner is of the opinion that the method of competition or the act or practiced in question is prohibited by this chapter, the commissioner shall make a report in writing to the person complained of in which he shall state his findings as to the facts and shall forward by certified mail to such person an order to cease and desist from using such methods of competition or such act or practice, or, if the amount involved is less than two thousand dollars, an order directing restitution, or both. the commissioner may apply for the enforcement of any cease and desist order, order directing restitution or consent order issued under this chapter to the superior court for the judicial district of Harford, or to any judge thereof if the same is not in session, for orders temporarily and permanently restraining and enjoing any person from continuing violations of such cease and desist order, order directing restitution or consent order. Such application of temporary restraining order, temporary and permanent injunction, order directing restitution and for such other appropriate decree

or process shall be brought and the proceedings thereon conducted by the attorney general.

(e) In addition to any injunction issued pursuant to subsection (d) of this section, the court may make such additional orders or judgments as may be necessary to restore to any person interest any moneys or property, real or personal, which may have been acquired by means of any practices prohibited by this chapter, including the appointment of a receiver or the revocation of a license or certificate authorizing the person subject to the order or injunction to engage in business in this state, or both.

(f) The commissioner or the attorney general or their employees shall disclose, in accordance with the provisions of chapter 3, all records concerning the investigation of any alleged violation of any provision of this chapter including, but not limited to, any complaint initiating an investigation and all records of the disposition or settlement or a complaint. For purposes of this section, "disposition" shall include the following action or nonaction with respect to any complaints or investigations: (A) No action taken because of (i) a lack of jurisdiction; (ii) unsubstantiated allegations or (iii) a lack of sufficient information to draw a conclusion, as determined by the commissioner, after investigation; (B) referral to another state agency, or to a federal or local agency, or to law enforcement authorities; (C) an acceptance of an assurance of voluntary compliance in accordance with the provision of section 42-110j; and (D) formal action taken, including the institution of administrative proceedings pursuant to subsection (d) of this section or court proceedings pursuant to section 42-110m, 42-100o or 42-100p. The commissioner may withhold such records from disclosure during the pendency of an investigation or examination held in accordance with subsection (a) of this section, but in no event shall the commissioner withhold any such records longer than a period of eighteen months after the date on which the initial complaint was filed with the commissioner or after the date on which he investigation or examination was commenced, whichever is earlier. Nothing herein shall be

deemed to affect the rights of litigants, including parties administrative proceedings, under the laws of discovery of this state.

(1973; P.A. 73-615, §§ 4, 12, 13, eff. July 1, 1973; 1975, P.A. 75-618, § 3, eff. July 1, 1975; 1976, P.A. 76-436, § 279, eff. July 1, 1978; 1978, P.A. 78-280, § 5, eff. July 1, 1978; 1979, P.A. 79-395, §§ 1, 2; 1981, P.A. 81-356, § 1; 1984, P.A. 84-468, § 1, eff. June 8, 1984; 1988, P.A. 88-230, § 1; 1988, P.A. 88-317, § 91; 1990, P.A. 90-98, § 1.)

§ 42-110e. Appeals

Any person required by an order of the commissioner to cease and desist from using any method, act or practice declared unlawful by section 42-110b or to make restitution may appeal therefrom in accordance with the provisions of section 4-183. Appeals under this section shall be privileged cases to be heard by the court as soon after the return day as shall be practicable.

(1973, P.A. 73-615, § 5, eff. July 1, 1973; 1976, P.A. 76-436, § 280, eff. July 1, 1978; 1977, P.A. 77-603, § 122, eff. July 1, 1977; 1981, P.A. 81-356, § 2.)

§ 42-110f. Powers of receiver. Restitution. Judicial supervision

When a receiver is appointed by the court pursuant to this chapter, he shall have the power to sue for, collect, receive and take into his possession all the goods and chattels, rights and credits, moneys and effects, lands and tenements, books, records, documents, papers, choices in action, bills, notes and property of every description, derived by, or aiding in any manner, any practice declared to be illegal and prohibited by this chapter, including property with which such property has been mingled if it cannot be identified in kind because of such commingling, and to sell, convey, and assign the same and hold and dispose of the proceeds thereof under the direction of the court. Any person who has suffered damages as a result of the use or employment of any unlawful practices and submits proof to the

satisfaction of the court that he has in fact been damaged, may participate with general creditors in the distribution of the assets to the extent he has sustained out-of-pocket losses. In the case of a partnership or business entity, the receiver shall settle the estate and distribute the assets under the direction of the court. The court shall have jurisdiction of all questions arising in such proceedings and may make, such orders and judgments therein as may be required.

(1973, P.A. 73-15, § 6, eff. July 1, 1973.)

§ 42-110g. Action for damages. Class actions. Costs and fees. Equitable relief

(a) Any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment of a method, act or practice prohibited by section 42-110b, may bring an action in the judicial district in which the plaintiff or defendant resides or has his principal place of business or is doing business, to recover actual damages. Proof of public interest or public injury shall not be required in any action brought under this section. The court may, in its discretion, award punitive damages and may provide such equitable relief as it deems necessary or proper.

(b) Persons entitled to bring an action under subsection (a) of this section may, pursuant to rules established by the judges of the superior court, bring a class action on behalf of themselves and other persons similarly situated who are residents of this state or injured in this state to recover damages.

(c) Upon commencement of any action brought under subsection (a) of this section, the plaintiff shall mail a copy of the complaint to the attorney general and, upon entry of any judgment or decree in the action, shall mail a copy of such judgment or decree to the attorney general.

(d) In any action brought by a person under this section, the court may award, to the plaintiff, in addition to the relief provided in this section, costs and reasonable attorneys' fees based on the work reasonably performed by an attorney and not on

the amount of recovery. In a class action in which there is no monetary recovery, but other relief is granted on behalf of a class, the court may award, to the plaintiff, in addition to other relief provided in this section, costs and reasonable attorneys' fees. In any action brought under this section, the court may, in its discretion, order, in addition to damages or in lieu of damages, injunctive or other equitable relief.

(e) Any final order issued by the department of consumer protection and any permanent injunction, final judgment or final order of the court made under section 42-110d, 42-110m, 42-110o or 42-110p shall be prima facie evidence in an action brought under this section that the respondent or defendant used or employed a method, act or practice prohibited by section 42-110b, provided this section shall not apply to consent orders or judgments entered before any testimony has been taken.

(f) An action under this section may not be brought more than three years after the occurrence of a violation of this chapter.

(1973, P.A. 73-615, § 7, eff. July 1, 1973; 1974, P.A. 74-183, § 174, eff. Dec. 31, 1974; 1975, P.A. 75-618, § 5, eff. July 1, 1975; 1976, P.A. 76-303, § 3, eff. June 1, 1976; 1978, P.A. 78-280, § 2, eff. July 1, 1978; 1978, P.A. 78-346, § 2; 1979, P.A. 79-210, § 1; 1984, P.A. 84-468, § 2, eff. June 8, 1984.)

§ 42-110h. Class actions

As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subsection may be conditional, and it may be amended before decision on the merits. An order issued under this section shall be immediately appealable by either party.

(1973, P.A. 73-615, § 8, eff. July 1, 1973; 1984, PJL 84-468, § 3, eff. June 8, 1984.)

§ 42-110i. Repealed. (1984, PJL 84-468, § 9, eff. June 8, 1984.)

* * * * *

§ 42-110j. Voluntary compliance

In the administration of this chapter, the commissioner may accept an assurance of voluntary compliance with respect to any method, act or practice deemed in violation of this chapter from any person alleged to be engaged or to have been engaged in such method, act or practice. Such assurance may include an amount as restitution to aggrieved persons. No such assurance of voluntary compliance shall be considered an admission of violation for any purpose. Matters thus closed may at any time be reopened by the commissioner for further proceedings in the public interest.

(1973, P.A. 73-615, § 10, eff. July 1, 1973.)

* * * * *

§ 42-110*l*. Assistance by court prosecutors

The various states attorneys and prosecuting attorneys shall lend to the commissioner or attorney general such assistance as either may request in the commencement and prosecution of actions pursuant to this chapter.

(1973, P.A. 73-615, § 14, eff. July 1, 1973.)

§ 42-110m. Restraining orders or injunctions. Relief

(a) Whenever the commissioner has reason to believe that any person has been engaged or is engaged in an alleged violation of any provision of this chapter said commissioner may proceed as provided in section 42-110d and section 42-110e or may request the attorney general to apply in the name of the state of Connecticut to the superior court for an order temporarily or permanently restraining and enjoining the continuance of such act or acts or for an order directing restitution and the appointment of a receiver in appropriate instances, or both. Proof of public interest or public injury shall not be required in any action brought pursuant to section 42-110d, section 42-110e or this section. The court may award the relief applied for or so much as it may deem proper including accounting and such other relief as may be granted in equity. In

such action the commissioner shall be responsible for all necessary investigative support.

(b) Nothing contained in this chapter shall be construed as a limitation upon the power or authority of the state, the attorney general or the commissioner to seek administrative, legal or equitable relief as provided by other statutes or at common law.

(1975, P.A. 75-618, § 4, eff. July 1, 1975; 1984, P.A. 84-468, § 4, eff. June 8, 1984; 1991, P.A. 91-406, § 12, eff. July 12, 1991.)

§ 42-110n. Consent orders

(a) In the administration of this chapter, the commissioner, any time after the issuance of a complaint provided for in subsection (d) of section 42-110d, may accept an agreement by any person charged with violating the provisions of section 42-110b to enter into a written consent order in lieu of an adjudicative hearing. The acceptance of a consent order shall be within the complete discretion of the commissioner or such presiding officer as had been designated by the commissioner.

(b) The consent order provided for in subsection (a) of this section shall contain: (1) An admission of all jurisdictional facts; (2) an express waiver of the right to seek judicial review or otherwise to challenge or contest the validity of the order; (3) a provision that the complaint may be used in construing the terms of the consent order; (4) a statement that the consent order shall have the same force and effect as an order entered after a full hearing and shall become final when issued; (5) a specific assurance of discontinuance of each of the acts alleged in the complaint; (6) the signature of each of the individual respondents or his counsel; and (7) the signature of the commissioner or of his authorized representative.

(c) Negotiations leading up to the acceptance of a consent order are not open to the public. The consent order itself is a matter of public record.

(d) A consent order shall have the same force and effect as a cease and desist order issued pursuant to subsection (d) of section 42-110d.

(1975, P.A. 75-618, § 7, eff. July 1, 1975.)

§ 42-110*o*. Civil penalties

(a) Any person who violates the terms of a temporary restraining order or an injunction issued under subsection (d) of section 42-110d or subsection (a) of section 42-110M shall forfeit and pay to the state a civil penalty of not more than twenty-five thousand dollars per violation. For purposes of this section the court issuing the injunction shall retain jurisdiction, and the cause shall be continued, and in such cases the attorney general acting in the name of the state may petition for recovery of civil penalties.

(b) In any action brought under section 42-110m, if the court finds that a person is willfully using or has willfully used a method, act or practice prohibited by section 42-110b, the attorney general, upon petition to the court, may recover, on behalf of the state, a civil penalty of not more than two thousand dollars for each violation. For purposes of this subsection, a willful violation occurs when the party committing the violation knew or should have known that his conduct was a violation of section 42-110b.

(1975, P.A. 75-618, § 9, eff. July 1, 1975; 1987, P.A. 87-297.)

§ 42-110p. Dissolution, suspension or forfeiture of corporate franchise for violation of Injunction

Text of section effective until September 1, 1993. For text of section effective September 1, 1993, see § 42-110p, post.

Upon petition by the attorney general, the superior court for the judicial district of Hartford-New Britain may, in its discretion, order the dissolution or suspension or forfeiture of the franchise of any corporation which violates the terms of any injunction issued under section 42-110m.

(1975, P.A. 75-618, § 10, eff. July 1, 1975; 1980, PJL 80-483, § 170, eff. June 6, 1980.)

§ 42-110p. Dissolution, suspension or forfeiture of corporate franchise for violation of injunction

Text of section effective September 1, 1993. For text of section effective until September 1, 1993, see § 42-110p, ante.

Upon petition by the attorney general, the superior court for the judicial district of Hartford may, in its discretion, order the dissolution or suspension or forfeiture of the franchise of any corporation which violates the terms of any injunction issued under section 42-110m.

(1975, P.A. 75-618, § 10, eff. July 1, 1975; 1980, P.A. 80-483, § 170, eff. June 6, 1980; 1988, P.A. 88-230, § 1; 1990, PA. 90-98, § 1.)

§ 42-110q. Service contract agreements. Fee disclosure required

(a) For the purposes of this section: (i) "Service contractor" is defined as a person engaged in the business of repairing, overhauling, adjusting, assembling or disassembling consumer goods; (ii) "person" means a natural person, corporation, trust, partnership, incorporated or unincorporated association, and any other legal entity; (iii) "consumer goods" means any article purchased, leased or rented primarily for personal, family or commercial purpose.

(b) It shall be an unfair or deceptive trade practice, in violation of this chapter, for any service contractor to fail to disclose to a prospective customer, at the time the prospective customer makes initial contact by any means with the service contractor, that a service call made by the service contractor to the home or business of the prospective customer will require the payment by the prospective customer to the service contractor of separate and distinct fees for the following, if such is the case: (i) Service charge, defined as the fee charged by the service contractor to respond to the request for services; (ii) labor charge.

(1977, P.A. 77-464, §§ 1, 2.

TITLE 28, U.S. CODE

§ 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court, The jurisdiction of the United States Court of Appeals for the Federal Circuit of Appeals shall be to the limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

(As amended Apr. 2, 1982, Pub.L. 97-164, Title I, § 124, 96 Stat. 36)

§ 1292. Interlocutory decisions

(a) Except as provided in subsections (e) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam and the District Court of the Virgin Islands, or of the judges thereof; granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

[(4) Repealed. Pub.L 97-164, Title I, § 125(a)(3), Apr. 2, 1982, 96 Stat 36]

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there in substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

(c) The United States court of Appeals for the Federal Circuit shall have exclusive jurisdiction—

(1) of an appeal from an interlocutory order or decree described in subsection (a) or (b) of this section in any case over which the court would have jurisdiction of an appeal under section 1295 of this title; and

(2) of an appeal from a judgment in a civil action for patent infringement which would otherwise be appealable to the United States Court of Appeals for the Federal Circuit and is final except for an accounting.

(d)(1) When the chief judge of the Court of International Trade issues an order under the provision of section 256(b) of this title, or when any judge of the Court of International Trade, in issuing any other interlocutory order, includes in the order a statement that a controlling question of law it involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order,

if application in made to that Court within ten days after the entry of such order.

(2) When the chief judge of the United States Court of Federal Claims issues an order under section 798(b) of this title, or when any judge of the United States Court, in issuing an interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(3) Neither the application for nor the granting of an appeal under this subsection shall stay proceedings in the Court of International Trade or in the Claims Court, as the case may be, unless a stay is ordered by a judge of the Court of International Trade or of the Claims Court or by the United States Court of Appeals for the Federal Circuit or a judge of that court.

(4)(A) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction of an appeal from an interlocutory order of a district court of the United States, the District Court of Guam, the District Court of the Virgin Islands, or the District Court for the Northern Mariana Islands, granting or denying, in whole or in part, a motion to transfer an action to the United States Claims Court under section 1631 of this title.

(B) When a motion to transfer an action to the Claims Court in filed in a district court, no further proceedings shall be taken in the district court until 60 days after the court has ruled upon the motion. If an appeal is taken from the district court's grant or denial of the motion, proceedings shall be further stayed until the appeal has been decided by the Court of Appeals for the Federal Circuit. The stay of proceedings in the district court shall not bar the granting of preliminary or injunctive relief, where appropriate and where expedition is reasonably necessary. However, during the period in which proceedings are

stayed as provided in this subparagraph, no transfer to the Claims Court pursuant to the motion shall be carried out.

(e) The Supreme Court may prescribe rules, in accordance with section 2072 of this title, to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d).

(As amended Apr. 2, 1982, Pub.L. 97-164, Title I, § 125, 96 Stat. 36; Nov. 8, 1984, Pub.L. 98-620, Title IV, § 412, 98 Stat. 3362; Now. 19, 1988, Pub.L. 100-702, Title V, §1 501, 102 Stat. 4652; Oct. 29, 1992, Pub.L. 102-572, Title I, § 101, Title IX, § 906(c), 106 Stat. 4506, 4518.)

FEDERAL RULES OF CIVIL PROCEDURE

Rule 54. Judgments; Costs.

(a) DEFINITION; FORM. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) JUDGMENT UPON MULTIPLE CLAIMS OR INVOLVING MULTIPLE PARTIES. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) DEMAND FOR JUDGMENT. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings.

(d) COSTS. Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 92-9288

BETTY LINDQUIST,

Appellant,

—against—

SECURITY PACIFIC AUTO SERVICE CO.,

Appellee.

Heard: April 5, 1993
Courtroom #1705
United States Courthouse
40 Foley Square
New York, New York

Before:

HON. JOSEPH M. MCLAUGHLIN,
Presiding Circuit Court Judge

HON. WILLIAM H. TIMBERS,
Circuit Court Judge

HON. HARRY W. WELLFORD, *Sixth Circuit*

(Transcribed From Tape)

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JUDGE MCLAUGHLIN: Next case is Lindquist against Security Pacific.

Gentlemen.

JUDGE TIMBERS: You're arguing for the appellant?
MR. EDELMAN: Yes, your Honor.
JUDGE TIMBERS: You're Mr. Edelman?
MR. EDELMAN: Yes, your Honors.
JUDGE TIMBERS: What is left in this case, partial summary judgment was granted in favor of your client, was it not?
MR. EDELMAN: That is correct, on the merits.
JUDGE TIMBERS: And the judgment went against your client on the—
MR. EDELMAN: Class certification.
JUDGE TIMBERS: —on your claim of class certification and something else. What I'm getting at is this: Do we have a final judgment and therefore do we have appellate jurisdiction?
MR. EDELMAN: I believe that we do have a final judgment, your Honor. The Magistrate's opinion found that the additional consumer leasing act claims would not warrant granting additional relief.
JUDGE TIMBERS: I can't hear you.

JUDGE MCLAUGHLIN: I can't hear you either.

MR. EDELMAN: I'm sorry, your Honors.

The Magistrate found and the District Court adopted the opinion of the Magistrate that the other truth in leasing claims would not warrant the grant of any additional relief. We came to the same conclusion with respect to the state law claims, and a judgment was entered which closed the case and awarded $1,000 to plaintiff.

JUDGE TIMBERS: You say closed the case. Partial summary judgment implies to me the there is something else left as to which summary judgment was not granted. Now, is that so or not?

MR. EDELMAN: There were claims left but the Magistrate found that we don't have to address these claims because you wouldn't be entitled to any greater or different relief.

JUDGE TIMBERS: Well, either he or preferably Judge Daly, the District Judge, if that is so should have filed a Rule 54(b) certificate which would have made it a final judgment. He can't make it a final judgment just by saying that there are claims left but there's no merit to it. I'm just wondering. I don't want to prolong this. Maybe you want a chance to think it over, but it looks to me right on the face of it as though there's no final judgment and therefore no appellate jurisdiction.

MR. EDELMAN: I think, your Honor, when the District Court gives you all the relief to which you're entitled and says that under the other claims you're not entitled to any further relief even if they're found to be meritorious—

JUDGE TIMBERS: Well, why didn't he enter summary judgment as to those other claims then?

MR. EDELMAN: I don't—it wouldn't have been appropriate to enter summary judgment against us because that would imply a finding that the claims have no merit. He declined to address the merits of the claims because no further relief would have been warranted. I think—

JUDGE TIMBERS: You got me thoroughly and thoroughly confused.

JUDGE MCLAUGHLIN: Let me try it this way. Is there something still pending below?

MR. EDELMAN: No, your Honor.

JUDGE MCLAUGHLIN: Has a judgment been entered?

MR. EDELMAN: Yes, your Honor, in favor of the named plaintiff for $1,000.

JUDGE MCLAUGHLIN: As far as you're concerned it's over below?

MR. EDELMAN: Insofar as we're concerned; insofar as security Pacific is concerned, and insofar as the District Court is concerned. I think the legal effect of the judgment that was entered amounts to a summary judgment on one claim and the equivalent of a non-suit of the other claims on the ground that they don't add anything one way or the other to the case. I do admit that we could have made that more explicit in the judgment that was entered, but the Magistrate did find—

JUDGE TIMBERS: Who is asserting these other claims?

MR. EDELMAN: Lindquist would be asserting these other claims on behalf of herself and everyone else—and the proposed class.

JUDGE TIMBERS: And she has dropped them, has she?

MR. EDELMAN: I'm sorry?

JUDGE TIMBERS: She has dropped them?

MR. EDELMAN: No. She has concluded—she has gotten all the relief which she would be entitled to under any or all of these claims.

JUDGE TIMBERS: I'll tell you, it's a small world and a small District, Connecticut, and even smaller at Bridgeport. I spent a good many years in that courthouse. But I've never seen an animal like this that purports to be a final judgment, and you got some good judges here: Magistrate Smith and Judge Daly. There must be some reason that they didn't either enter a final judgment or a Rule 54(b) certificate which would have made this thing final.

You go ahead though.

MR. EDELMAN: However, I do wish to point out that at, I believe it's at Page 81 of the joint appendix the Magistrate finds that there's no need to address the other consumer leasing act claims because you're entitled to your $1,000 and that's it.

JUDGE TIMBERS: Well, that would have been a good reason to support a Rule 54(b) certificate. But I'm wasting your time, so please go ahead.

MR. EDELMAN: I don't consider it a waste of time. I do want to satisfy the court because everyone has treated this as the end of the case and I do want to satisfy the court that jurisdiction exists.

JUDGE TIMBERS: I think Judge McLaughlin asked the right questions. Is there anything left, and you said no.

MR. EDELMAN: I will very briefly make a couple of points. This claim as the court realizes arose under the Truth and Leasing Act. The Truth and Leasing Act requires disclosures of certain key terms and consumer leases and also regulates substantively the termination charges under leases. It's an important statute although there's essentially no law under it. About 20 to 25 percent of—

JUDGE MCLAUGHLIN: That's because nobody understands it.

MR. EDELMAN: That's true, but it is very important and I do want to emphasize that. About one out of five cars sold is sold to a leasing company and then leased. Approximately 50 to 80 percent of those leases end early, usually for reasons like increasing repair expenses or theft which are not foreseen, and the result is often a fairly large termination charge, two to ten thousand dollars.

The Federal Reserve Board has said that all lease disclosures must be reasonably understandable, including the disclosure of the early termination charge and that means reasonably understandable to a lay person. Leases, however, are not reasonably understandable and you continue to have a situation where large termination charges are imposed through difficult to understand terms.

JUDGE WELLFORD: Was your plaintiff in default under any, or claimed to be in default under any terms of the agreement?

MR. EDELMAN: No. The plaintiff was not in default.

JUDGE WELLFORD: No termination proceedings had been instituted in your plaintiff's case?

MR. EDELMAN: That is correct, your Honor.

JUDGE WELLFORD: This is purely a test case challenging the language in the lease, and so if there are others who may have been in default who may have suffered termination, are they in the same shoes as your plaintiff?

MR. EDELMAN: Let me answer in two parts. First, it is not really a test case. The plaintiff—the case started when the plaintiff contacted Security Pacific and asked how do I go about terminating this lease.

Second, the question of typicality I think involves an application of the wrong legal standard by the District Court. The legal test of typicality is whether the elements of the claims and defenses asserted on behalf of the named plaintiff and the class members are similar. The factors which Security Pacific relied upon and the Magistrate cited in his opinion do not go to the elements of the claims and defenses asserted. Whether somebody defaulted does not affect whether the disclosure statement complies with the requirements of Regulation M in the statute.

JUDGE WELLFORD: It brings about certain complications because it brings about the potentiality of counterclaims unless you're going to hold that the defendant should be cut off from presenting any counterclaims with regard to deciding for various class members.

MR. EDELMAN: Your Honor, the potential of a counterclaim exists in any truth and lending or truth and leasing case. Congress expressly contemplated that there would be class actions as the principal private enforcement mechanism under this statute. Congress did this even though it undoubtedly realized that any large business is going to be owed money by some of its customers, that is there is a potential of counterclaims there.

Accordingly, the two Courts of Appeals which have expressly addressed this issue, the Fifth and the Seventh, have held that the possibility of a,counterclaim is not a reason for denying a class. There's several things which can be done with a potential counterclaim.

First, there's the question of whether the class members are parties against whom counterclaims can be asserted at all. Second, it is—

JUDGE WELLFORD: You're saying then that the Truth and Lending Act reasonably would provide that a guilty defendant is cut off from counterclaims or was filing entirely separate action against a class member that might owe and be in default on monthly payments?

MR. EDELMAN: That is one possible course of action that's open. It would—under no circumstances would the defendant lose its rights. Under the Cooper decision of the Supreme Court, if the District Court decides that a certain claim is not included in the class action it is not included for res judicata purposes. So there's no question of cutting off Security Pacific's rights. The question is do we handle the counterclaims and the class action in some manner or simply relegate Security Pacific to its usual collection proceedings which it has been doing all along in the case of people who are in default. Some courts will take one course of action; some courts will take the other. However, the Hanes and the Roper cases both hold that denial of a class is not an appropriate alternative under these circumstances because Congress contemplated class actions as an enforcement mechanism and necessarily contemplated that some class members would have to be in default.

Another possibility would be to simply define the class in terms of persons who are not in default. There's no standing requirement.

I see my time is up, so unless the court has some question—

JUDGE MCLAUGHLIN: You've got some time for rebuttal, don't you?

MR. EDELMAN: Yes, your Honor. Thank you.

JUDGE TIMBERS: Did you come all the way from Chicago to argue this?

MR. EDELMAN: Yes, your Honor.

JUDGE TIMBERS: I commend you. I just came back from Chicago myself. Glad to get back here, I might say.

MR. LEE: Good morning, your Honors. My name is Charles Lee. I represent Security Pacific. May it please the Court—plaintiff's position in this case is based on what we believe are two fallacies. The first is that because this is a lawsuit under the Consumer Leasing Act also known as the Truth and Leasing

Act, that the certification of a class is either mandatory or somehow favored, and the second is about what is present in this case as your Honor raised at the outset.

With respect to the first point about the certification of class actions, I would like to just quote from the legislative history which is not in the briefs but comes out of the report of the Senate Banking Committee in 1976 at the time the Consumer Leasing Act was enacted. In that amendment to the Truth and Lending Act, Congress also increased the ceiling on class action damages in the statutory sense from $100,000 to $500,000. The Senate Committee then said, "The Committee is aware of the many difficulties surrounding the use of class actions for civil penalties or punitive damages. The largest obstacle to class actions may lie in the procedural rules applicable to them, as for example the notification requirements under the case of Eisen rather than in any necessarily arbitrary ceiling on recovery. For this reason the Committee through its subcommittee on consumer affairs intends to look at alternative private enforcement procedures such as the so-called Quitam or private attorney general action. We are hopeful that there may be workable and effective substitutes for the class action as the consumer enforcement device, not only for this act but also for other similar legislation."

So within the legislative history itself of the Consumer Leasing Act, you have Congress expressing some reservations contrary to many of the things that have been included in plaintiff's brief about class actions. At least the court is justified in applying its normal rigorous analysis and is justified in demanding strict application of the requirements of Rule 23 as the court recently said in Sheehan v. Purolator.

Now, the second fallacy I believe in plaintiff's papers are what's left in the case. Now, plaintiff's motion for class action specified the four counts of her complaint. The four counts include the first count which is for the substantive violations, that the mileage charges and the early termination charges are excessive.

The second count is the one that the certification was granted on which was the adequacy of the disclosure of the early termination charge.

The third count was under State law whichever states law might apply that these provisions are void as penalties and the fourth count was under the State Unfair Trade Practices Act similar to Connecticut Unfair Trade Practices Act, but applicable to all fifty.

Now, the difficulty with what has been said is in the motion for judgment on the damages which appears in the appendix at Page 88, it specifically says that in the event of class certification defendant reserves the right to contest damages and plaintiff reserves the right to pursue the class claims asserted in the complaint. So, it seems to us that all of these other claims are potentially raiseable, for want of a better word. Partial summary judgment was granted. That's what was converted into a final judgment. But the fact that these other claims, the substantive truth in leasing claims and the state claims could potentially come up—

JUDGE TIMBERS: Well, the state claims, of course, would be pending claims. It would depend on the outcome of the federal claims. But do I gather from what you say in short the Magistrate was not correct when he said there's nothing to these other claims?

MR. LEE: Your Honor, what he said was in the context of the motion for partial summary judgment, that motion was just on the disclosure claims. He did not have before him, except in the class action motion, the substantive truth in leasing claims or the state claims. The partial summary judgment was just on the adequacy of disclosure of the early termination charge. He had two other non-disclosure allegations that were in the second count. He said I don't need to reach them because I found one inadequate disclosure.

JUDGE TIMBERS: Don't lose me on this. I think I understand what you said but it is your conclusion that we do not have a final judgment before us as to those other claims, the claims other than the state pending claims?

MR. LEE: Correct. I believe there is a final judgment as to the disclosure claim, but not—

JUDGE TIMBERS: The one as to which summary judgment was granted—

MR. EDELMAN: Correct.

JUDGE TIMBERS: —in plaintiff's favor?

MR. LEE: But it's my understanding that these—in fact, the rights were reserved as to the first and third and fourth counts.

JUDGE TIMBERS: Why didn't you move to dismiss then for lack of—

JUDGE MCLAUGHLIN: Dismiss the appeal, why didn't you make that motion?

MR. LEE: We felt that there was a final judgment with respect to the second count. In fact, we—

JUDGE TIMBERS: We are talking about the other ones that you say are still pending. You're going to have to try sometime according to you.

JUDGE MCLAUGHLIN: If it is it totally final it is only partially final. If it's only partially final you need a Rule 52 certification.

JUDGE TIMBERS: Your law library in Stamford may not be as—you are from Stamford, are you not?

MR. LEE: Yes.

JUDGE TIMBERS: One of our suburbs, I might say, but what I'm suggesting is that you get up to the library in Bridgeport and you'll find the law laid out pretty clearly under what the requirements are in this court for a Rule 54(b) certificate, and I'm sure Judge Daly has been through this many times. You can't just say that it's a final judgment because whatever the statutory words are according to Judge Friendly it is not a matter of Rote. The judge has to state reasons for finding that final judgment should be entered, and there's no just reason for delay. I guess those are the words.

I'm not sure where we stand. I happen to be very sensitive to any possibility that we're acting on a judgment which isn't final and as to which—if that is so, as to which we do not have jurisdiction. But I'm puzzled by your opponent's answer to

Judge McLaughlin's question. There's nothing else left in the case. Now, you say there is. How are we going to resolve that?

We can't stay here all morning trying to figure out what's the answer to that. Maybe you should leave it to us and let us see if we could figure it out.

MR. LEE: I'm inclined to do so, your Honor.

JUDGE MCLAUGHLIN: You are well advised.

MR. LEE: If I may just address the issue to which we are the cross appellant which is the finding by the Magistrate judge as affirmed by the District Court.

JUDGE WELLFORD: Before you do that, assuming that we do have jurisdiction, why does the plaintiff not meet Rule 23 requirements to be a proper class action representative?

MR. LEE: In fact, it is primarily because his claims are not common or typical under 23(a) as your Honor you started to explore with the other side. Mrs. Lindquist has not been found in default; has not had excess mileage charges imposed upon her.

JUDGE WELLFORD: Well, you could define the class then in the same category in which plaintiff exists and say only those in the class who are not in default and who have this particular type of contract. But why would the plaintiff not be a proper class representative for such a class?

MR. LEE: Well, let me just say at the outset, the requested class was all persons signing the Security Pacific lease or others similar to it.

JUDGE MCLAUGHLIN: That's the class as plaintiff would define it.

MR. LEE: That's right. And that is what was before—

JUDGE WELLFORD: The court doesn't have to say if the plaintiff describes a class that is too broad we throw the whole thing out rather than the court limiting the class that may be applicable.

MR. LEE: That's right, your Honor. The court chose to proceed that way but I think there's some other very important problems here. The second one is you then have to go on to 23(b) and ask yourself is it under a B2 or B3 class. The court

below found that in terms of the B2 class they had not demonstrated necessity.

Now, in their briefs they say we're asking this court to change its position on the showing of necessity for a B2 class, and then—

JUDGE WELLFORD: Well, that applies only where there's a government defendant, doesn't it?

MR. LEE: Not necessarily, your Honor. You see, the B2 class is the classical—

JUDGE WELLFORD: Well, where is there a case that says it applies in the case of a private defendant?

MR. LEE: We cite a case called Gray v. International Brotherhood of Electrical Workers, Gray v. IBEW, and some other unions coming out of the district of the District of Columbia which did apply that to a non-governmental party. But I think the other argument they make is necessity shouldn't apply where there's claims for money damages.

Now, the problem with that is that then you'd have to ask yourself is this properly a B2 class. Isn't the claim for money damages so important of the class that it really goes in to the B3 classification.

JUDGE TIMBERS: Haven't we held just the opposite with respect to the necessity of monetary damages. In the Davis case —they're all citing cases I wrote in other circuits. I wrote that one for this court a few years back, Davis against Smith. I think we squarely held that the monetary damage claim was not necessary for a Rule 23.

MR. LEE: What—

JUDGE TIMBERS: 23(b) class certification.

MR. LEE: In Davis, your Honor, what the court held was there was no claim for retroactive monetary damages because it involved welfare benefits and they can't be awarded retroactively. And therefore, the certification was—that was a necessity case. It wasn't necessary to certify the class and it found there was no retroactive claim for damages. Here, there is a claim for retroactive damages, and it's not just statutory damages; it's actual damages which gets you into an individualistic determination of what the damages are. What we think is

that really is they're talking about a B3 class which is a damage class and then you get into the question of whether these common questions predominant, and we don't think they do because of the disparity between the plaintiff and the other members of the class. And you have to think about unmanagability, and again if these state claims are around that is a real problem because you may be looking at the laws of fifty states. There's a choice of law clause in this lease which says it will be governed by the law of the domicile residence of the lessee. And that—in short, that's why we think it isn't a proper class certification.

In the seconds I have left to me, I'd also like to just say with respect to the proprietary of the disclosure of this termination agreement, I just want to say that it is a very simple thing to calculate what the amounts are in this lease. In a nutshell, it says the late termination—the early termination charge shall be $250, anything you haven't paid to date, any taxes that may be required by the turn-in, and here's the big item, the differential between the depreciated value of the car and the actual wholesale value of the car. And that's it.

Now, they—

JUDGE WELLFORD: That isn't what it said.

MR. EDELMAN: It says—Right. The language is the difference between the leasebalance —

JUDGE WELLFORD: It says the adjusted lease balance as described in Item 8.

MR. EDELMAN: Right.

JUDGE WELLFORD: So then you got to go look over in Item 8 and find out what adjusted lease balance may mean.

MR. LEE: Right.

JUDGE MCLAUGHLIN: When you look at Item 8 it refers you to the statement of financial accounting standards, FASB, and when you look at that it's 200 pages.

MR. EDELMAN: Your Honor, I'm glad you raised that because it does say—

JUDGE MCLAUGHLIN: I'll bet you are.

MR. EDELMAN: You don't have to go to FASB 13 is the point. It says these calculations will follow the rules for jour-

nal entries as stated in FASB 13, but you can do this calculation in your head without ever opening FASB 13. It's like a reference to a standard if there's a dispute. What it says is, if you look at it, the average lease charge is $102.24 a month. Just above it it says the base payment is $227 a month. Now, if you subtract $102 from $227 you get what the average depreciation is that's credited in each monthly payment—each monthly charge as payment.

This lessee was depreciating the car at $125 a month. That's it. Now, that's the average, but you come out—you come within two percent at any month if you pursue this approach, and you are allowed to estimate under the regs. I see my red lights on.

JUDGE MCLAUGHLIN: Thank you, Mr. Lee.

JUDGE WELLFORD: Is the act reasonably require in that instance that all you had to do was say then the depreciation in this particular agreement is X dollars and that would have made it plain and simple to the ordinary purchaser.

MR. LEE: The problem is you can't do that in a form lease. You have to adjust that for every car.

JUDGE WELLFORD: Right. All you have to do is then say the depreciation in this lease is X dollars. That puts that burden on your company. Doesn't the Truth and Lending Act say you got to do that much?

MR. LEE: It says you must disclose the amount or method for this one. It does say amount on others, but for this one it says amount or method.

JUDGE MCLAUGHLIN: Thank you very much. Mr. Edelman.

MR. EDELMAN: Your Honors, I shall be very brief. I'd first like to address—I'd first like to address the second paragraph of the Order in JA88. It's a rather unique problem to truth and lending cases. 15 U.S.C. 1640 provides for a different measure of damages in a class action than in an individual action. Therefore, it would be necessary to redetermine damages if the court were to reverse in the class issue, and it is also conceivable that some of the other claims asserted would, in a class action but not in an individual action, confer additional potential rights upon the plaintiff and the class members. But as it stands now, we've gotten what we're entitled to.

With respect to class certification we do not contend that a class action is mandatory. our point rather is that given the legislative history which was adapted, and there were some reservations about the class action mechanism generally but the court—but rather Congress went ahead and provided for the class action with a cap of statutory damages.

The point rather is that it's not appropriate for a court to hold that something which is inherent in each and every truth and lending and truth and leasing case is a barrier to class certification. Things like the availability of attorney's fees in an individual action which were relied upon by the District Court.

With respect to the necessity issue, the Gray case involved a union which like a governmental defendant has a duty to treat all similarly situated persons equally. We know of no case where an entity which is not in that category, either a governmental entity or something which has that duty is required—has had a class action against it denied on of relief involved in this case is sought.

Finally, with respect to the proprietary of the defendant's disclosures, there's actually no need to obfuscate at all. The defendant runs the calculations for particula r lease by its computer as soon as the individual comes into the dealership. At th e time—your Honors are correct, at the time the lease is entered into the amount of depreciation is a known quantity. We included in the record examples of leases which provide for disclosures of the known quantity. All that's necessary to do is to get the computer to fill in the blanks. The problem rather is that there's a very strong economic incentive on the part of lessors not to make this liability clear. By not making it clear the monthly payments can be pointed to as being very low and reasonable. The lessee readssome seventy lines of text and references to accounting principles and does not understand from that, as the Federal Reserve Board intended, that there is a charge which in dollar terms amounts to two to ten thousand dollars, hidden in this language. As a result, because of a high proportion of leases that are terminated early, a large percentage of the lessor's revenue is in the form of early termination charges and there is no competition with respect to these early termination charges.

JUDGE WELLFORD: What standard do we apply to the District Court's finding, a partial summary judgment for you on the disclosure issue?

MR. LEE: That I believe, your Honor, is an issue of law. It is not a question of clearly erroneous or abusive discretion. I also submit that the class issues presented in this case are also legal issues. I think that the District Court applied legal criteria which are not appropriate in the context of this statute and in the context of Rule 23 generally. So the issues before the court, your Honor, are basically legal in nature.

JUDGE WELLFORD: Well, on the summary judgment that you received on the disclosure issue, what standard do we apply in reviewing that?

MR. EDELMAN: The court can look at the matter Denoval. I would not disagree with the defendant in that, your Honor. Unless the court has some questions,that would conclude my remarks, your Honors.

JUDGE MCLAUGHLIN: Thank you, Mr. Edelman.

We will reserve decision.

* * * * * *

I hereby state that the foregoing is a true and accurate transcript of the testimony of this Court of Appeals hearing to the best of my ability.

/S/ NEIL M. SEFF
Neil Seff, *Reporter*

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

CIV. NO. 5:91CV754 TFGD

BETTY LUNDQUIST, on behalf of herself and all others similarly situated,

Plaintiff,

—v.—

SECURITY PACIFIC AUTOMOTIVE FINANCIAL SERVICES CORPORATION,

Defendant.

PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff, Betty Lundquist ("Ms. Lundquist"), respectfully requests, pursuant to Rule 56 of the Federal Rules of Civil Procedure, that the Court grant summary judgment in favor of herself and (upon certification) the class as to the liability of defendant Security Pacific Automotive Financial Services Corporation ("Security Automotive") under Count II of his complaint, on the ground that there is no issue of material fact that the printed form of automobile lease used by Security Pacific failed to comply with the disclosure requirements of the Truth in Leasing Act.

The pendency of plaintiff's motion for leave to amend her complaint does not affect this motion, as Count II of her proposed amended complaint is the same as Count II of the original complaint.

The federal Truth in Leasing Act, 15 U.S.C. § 1667 et seq. ("Truth in Leasing Act"), and implementing Federal Reserve Board regulations, 12 C.F.R. part 213 ("Regulation M"), and Staff Commentary, 12 C.F.R. part 213 Supp. I ("Commentary"), require extensive disclosures in consumer lease transactions and

regulate certain substantive terms of such transactions. The disclosures are analogous to those required by the Truth in Lending Act in consumer credit transactions. The specific information that must be disclosed in connection with a lease includes:

a. "The amount or method of determining the amount of any penalty or other charge for delinquency, default, or late payments." 12 C.F.R. § 213.4(g)(10).

b. "A statement of the conditions under which the lessee or lessor may terminate the lease prior to the end of the lease term and the amount or method of determining the amount of any penalty or other charge for early termination." 12 C.F.R. § 213.4(g)(12).

c. "A statement identifying any express warranties or guarantees available to the lessee made by the lessor or manufacturer with respect to the leased property." 12 C.F.R. § 213.4(g)(7).

On its face, the Security Pacific lease form fails to comply with these requirements. Accordingly, Ms. Lundquist is moving for summary judgment based on those grounds.

In further support of this motion, Ms. Lundquist submits the accompanying statement of material facts and memorandum of law.

Respectfully submitted,

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ct04137

By /s/ [ILLEGIBLE]

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16. EARLY TERMINATION LIABILITY

At any time after I [the lessee] sign this lease, you [Security Pacific] may terminate it if any of the conditions described in Item 22 occur or this lease is in default as described in Item 23.

I agree that my payment liability upon early termination will be the sum of:

(a) A termination fee of $250; plus

(b) Any monthly lease payments already due you which are unpaid and any other amounts arising from my failure to keep my promises under this lease; plus

(c) The amount, if any, by which the sum of the Adjusted Lease Balance as described in Item 8, plus One Base Payment, Item 3.A., exceeds the Realized Value, as determined in accordance with Item 15; plus

(d) Any official fees and taxes imposed in connection with lease termination (for example, sales/use taxes due on deficiency balance under (c)).

Item 8, referred to in Item 16, states:

8. ALLOCATION OF MONTHLY LEASE PAYMENTS

Portions of each monthly lease payment are for depreciation, lease charge and sales/use tax. While the total amount of each monthly lease payment will be the same (assuming that current sales/use tax rates, if applicable, do not change), the depreciation and lease charge portions will differ with each payment. During the lease term you will earn a total of lease charges equal to the product of the number of monthly lease payments, due under the lease times *$102.24*, the average monthly lease charge. The lease charges will be earned by you on a constant yield basis in relation to the Adjusted Lease Balance as it declines during the lease term. The lease charge portion for any monthly lease payment is figured by multiplying the rate which provides a constant yield throughout the lease term times the Adjusted Lease Balance. Again, the portion of the monthly

payment not allocated to lease charges or sales/use tax will be allocated to depreciation. (These calculations will follow the rule for journal entries for lessors as to direct financing leases obtained in Statement of Financial Accounting Standards No. 13.)

At any given time the Adjusted Lease Balance is:

(a) $18,780.00 less (b) the sum of (1) all depreciation amounts received by you to date plus (2) one Base Payment, Item 3.A.

Item 15 provides as follows:

15. VEHICLE VALUATION AT EARLY TERMINATION

My termination liability in the event of early termination will be affected by the Realized Value of the vehicle. The Realized Value may be determined in one of the following ways:

(a) Within ten (10) days after I return the vehicle, you and I may enter into a written agreement as to the vehicle's value, should I request it, or I may obtain a professional appraisal of the wholesale value of the vehicle made by a qualified person I find, who is acceptable to you as well as to me. I agree that the expense of any such appraisal will be mine.

(b) If the Realized Value is not determined as above within ten (10) days after return of the vehicle, you will attempt to obtain three bids to purchase the vehicle at wholesale for cash or may establish the Realized Value in some other commercially reasonable manner. I will have the right to submit a written bid which you agree to consider together with all other bids you may receive. Even though you may decide not to sell the vehicle to any bidder, the highest bona fide bid received (which is supported by whatever proof of ability to pay you may require) will be considered the vehicle's Realized Value.

I understand and agree that the Realized Value amount will be exclusive of any official fees and taxes imposed upon the disposition of the vehicle.

Item 3 provides, in relevant part:

3. MONTHLY LEASE PAYMENTS

A. Base Payment.....$227.29

. . .

D. Total Monthly Lease Payment.....$289.22

UNITED STATES DISTRICT COURT

N.D. ILLINOIS, E.D.

No. 91 C 3368

Oct. 6, 1992

ZETTIE W. WESLEY, etc.,

Plaintiffs,

—v.—

GENERAL MOTORS ACCEPTANCE CORPORATION,

Defendant.

MEMORANDUM OPINION AND ORDER

SHADUR, *Senior District Judge.*

In this class action Zettie Wesley ("Wesley") charges, on her own behalf and that of her fellow class members, that automobile leases issued by General Motors Acceptance Corporation ("GMAC") violate the federal Consumer Leasing Act, 15 U.S.C. ss 1667-1667e ("the Act"),[1] its implementing regulations and Illinois law. GMAC now moves to dismiss portions of Wesley's Amended Complaint for failure to state a claim pursuant to Fed.R.Civ.P. ("Rule") 12(b)(6). For the reasons discussed in this memorandum opinion and order, the motion is granted in part and denied in part.

Procedural Background

Only three chapters from this case's tortured history need be recounted here. First, GMAC's present motion to dismiss targets the Amended Complaint filed by Wesley on April 27, 1992 (the "Complaint"). Earlier versions of the Complaint, and of the motion to dismiss, do not bear directly on the present motion.

1 Further statutory references will simply take the form "Section—."

Second, this Court has already granted plaintiffs' motion to certify a class comprising (Notice of Pendency of Class Action 1-2): All natural persons who (a) leased a car from GMAC primarily for personal, family, or household purposes; (b) signed a lease agreement using form numbers 671-DLP and 671-DLP-A, for a duration exceeding four months, and for a total lease obligation not exceeding $25,000; (c) signed their lease agreements in Illinois; (d) terminated (whether voluntarily or by default) their leases on or after April 26, 1990 but before the scheduled termination of their leases; and (e) were assessed an early termination formula using the sum of the monthly balances for calculation of unearned lease charges. Third, last year this Court decided a Rule 12(b)(6) motion to dismiss in Kedziora v. Citicorp Nat'l Services, Inc., 780 F.Supp. 516 (N.D.Ill.1991)—a putative class action against another large automobile lessor, brought by the same lawyers who represent the class in this case. That opinion held that numerous portions of the Kedziora complaint failed to state a claim upon which relief could be granted.

Wesley's response to the current motion is largely a pro forma effort to preserve her counsel's objections to the Kedziora opinion for use in an appeal of this case. Nothing about this Court's view of the law has changed since Kedziora was handed down. Because certain claims in this case are legally indistinguishable from like claims dismissed in Kedziora, those claims will be dismissed here by summary reference to the Kedziora opinion. And as a general matter, the logic and authorities relied upon in that opinion should be considered to be incorporated by reference into this one.

Allegations of the Complaint[2]

Wesley is an Illinois resident (P 3), while GMAC is a Delaware corporation doing business in Illinois (P 4). GMAC's

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2 Rule 12(b)(6) principles require this Court to accept as true all of the Complaint's well-pleaded factual allegations, drawing all reasonable inferences in Wesley's favor (Marmon Group, Inc. v. Rexnord, Inc., 822 F.2d 31, 34 (7th Cir.1987). Citations to the Complaint appear simply as "P—" and "Ex—."

regular business activities include the leasing of motor vehicles to consumers and the purchasing of consumer auto leases (P 5).

On December 19, 1986 Wesley leased a 1987 Pontiac Grand Am from GMAC for her personal use. Her lease was to run 60 months and called for monthly payments totalling $15,770.40 (P 6). GMAC issued a combination lease contract and disclosure statement (the "Lease" [3]) that said, among other things, that any unearned finance charges would be calculated according to the Rule of 78's (Ex. A). Agents of GMAC then altered the document by hand to substitute the term "sum of the monthly balances" for "Rule of 78's" (Ex. B).[4]

Wesley terminated the Lease in mid-1990, approximately a year and a half before its natural expiration date. That triggered the early termination provisions spelled out in the Lease (P 8). Lease P 12 dictates the basic method of calculating the customer's costs upon early termination (P 21). Lease P 8 spells out the terms upon which a customer who terminates early may buy his or her vehicle (P 22). And Lease P 13 imposes an "excess mileage charge" upon customers who terminate early but do not buy their vehicles.

Wesley alleges that numerous costs to the early terminating lessee are built into the attractive seeming form Lease used by GMAC. She claims that those aspects of the form Lease (and of her Lease in particular) are inadequately disclosed, substantively unreasonable or both. She says that most lessees terminate early, so that such Lease provisions impose substantial costs upon the thousands of Americans who lease their vehicles

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3 Because Wesley's Lease is alleged to be in GMAC's standard form, "Lease" will be used in this opinion to designate both her individual lease and the form document.

4 Wesley's initials appear next to that handwritten change, but she maintains that she never acknowledged the change and that some GMAC agent must have added her initials to the document. Her claim raises an issue of fact not suited for resolution on a Rule 12(b)(6) motion. All that this opinion can do, and all that it does, is to accept Wesley's contention that the change was made without her consent. This Court's previous comments about the same issue (1992 U.S.Dist. LEXIS 4998, at *2-*5 (N.D.Ill. Mar. 24, 1992)) related only to the effect of the handwritten changes on Wesley's suitability as a class representative. This opinion of course makes no findings of fact as to the issue.

through GMAC (PP 17-20). Further discussion of particular Lease provisions will be limited to those addressed by GMAC's motion to dismiss.

Legal Framework

Consumer credit terms in general are regulated by the Truth in Lending Act, Sections 1601-1693r ("TILA"). Consumer auto leases in particular fall within the provisions of the Act, which regulates the leasing of personal property for personal, family or household use. By embedding the Act within TILA, Congress demonstrated an intent to extend certain aspects of TILA—such as its damage provisions, definitions and rules of construction—to the universe of consumer leasing.

Sections 1667b and 1667a are most pertinent to this litigation. Kedziora, 780 F.Supp. at 520 identified their different functions: Section 1667b imposes substantive requirements of reasonableness on termination penalties or other charges, whereas Section 1667a imposes no substantive requirements of lease terms. Instead it merely requires adequate disclosure of lease terms.

"Reasonable" termination penalties under Section 1667b are those that approximate acceptable liquidated damages provisions under Uniform Commercial Code s 2-718(1) and Restatement (Second) of Contracts s 356(1) (1981). Kedziora, 780 F.Supp. at 527 (adapted to this case) described the "essential inquiry" into reasonableness in these terms: Is [a given] aspect of the damage formula reasonably calculated to ensure [GMAC] its expectancy damages, or is it merely a profit-enhancer calculated to punish the lessee who terminates early?

As for disclosure requirements, Section 1667a requires "clear and conspicuous" disclosure of various lease terms. Section 1601(a), describing TILA's broad purposes, calls for disclosures that are sufficiently "meaningful and accurate" to permit comparison shopping by consumers looking for the most favorable credit terms. Ford Motor Credit Co. v. Mithollin, 444 U.S. 555, 568 (1979) (emphasis and brackets in original) cautions:

Meaningful disclosure does not necessarily mean more disclosure. Rather, it describes a balance between "competing con-

siderations of complete disclosure . . . and the need to avoid . . . [informational overload]."

Those statutory provisions are given further content by Federal Reserve Board Regulation M (12 C.F.R. s213), which supplants and modifies the earlier Regulation Z (12 C.F.R. ss226.1 et seq.).[5] Accordingly the ensuing discussion will address both the statutes and that implementing regulation.

Automobile leasing provisions may also violate the Illinois common law (Kedziora, 780 F.Supp. at 532) or the Consumer Fraud and Deceptive Business Practices Act, III.Rev.Stat. ch. 112-1/2 , PP 261 et seq. ("CFA"[6]). CFA s 262 prohibits: Unfair methods of competition and unfair or deceptive acts and practices, including but not limited to the use or deployment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact, or the use or employment of any practice described in Section 2 of the "Uniform Deceptive Trade Practices Act" . . . . That statute has been subject to varying interpretations by the Illinois courts. As discussed in Kedziora, 780 F.Supp. at 532-34, as a general ride any aspect of the Complaint that states a claim under the Act is also likely to violate the CFA or the common law. By the same token, any challenges to the GMAC Lease that fail to state a claim under Illinois common law will also fail to state a claim under the Act.

Scope of the Complaint and the Motion To Dismiss

Wesley's Complaint contains six counts. Count I, a class claim, charges that the early termination provisions of the GMAC Lease violate the reasonabieness requirements of the

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5 Further citations to Regulation M will take the form "Reg. M s—."

6 Citations to CFA provisions will take the form "CFA s—." That usage comports with the Illinois General Assembly's use of that word and of the symbol "s" in its enactments, even though the publisher of the Smith-Hurd annotated version of the Illinois statutes has chosen to shift to "P" instead.

Act. Count II, also a class claim, charges that various Lease provisions violate the Act's disclosure requirements.

Count III, a third class claim, alleges additional disclosure violations. Count IV states Wesley's individual claims of inadequate disclosure. Count V challenges the early termination charges as "unreasonable penalties" under Illinois common law, while Count VI challenges various Lease provisions as violative of the Illinois consumer fraud statute quoted earlier.

GMAC's motion attacks five aspects of the Complaint. They will be dealt with seriatim.

Wholesale v. Retail Value

Lease P 12(c)(ii) provides that if the early terminating lessee does not purchase the vehicle, GMAC will sell the vehicle at wholesale "in a commercially reasonable manner," then credit the lessee with the greater of (1) the net proceeds of that sale and (2) the estimated end-of-term residual value (P 35). Wesley alleges that such a practice unreasonably deprives the consumer of one of the principal benefits of leasing a car: relief from the risk that the car will command a poor price when disposed of (P 36).

Wesley couples that contention with the allegation that GMAC also inflates the estimated residual value in order to impose "disproportionately large deficiencies" on consumers who terminate early (PP 37-38). That practice, she says, further increases GMAC's leverage over early terminators by enabling the company to offer to compromise on termination liability in exchange for the lessee's agreement to lease another vehicle (P 39).

Wesley further asserts that the lessee's right to an appraisal (Lease P 12(d)) provides inadequate protection against the wholesale-value/residual-value scheme (P 40), and she adds that no sale is necessary to calculate value upon early termination. Instead GMAC could simply use the same method that is used to calculate end-of-term residual value to determine residual value at any point in the Lease term (P 41). Finally, Wesley argues that GMAC unreasonably fails to adjust the

residual value figure to account for the early return of the vehicle, because a car actually returned 20 months into the Lease will generally be worth more than the estimated value of the same car if hypothetically returned after 60 months (P 43).

GMAC seeks disposal of those aspects of the Complaint predicated upon the allegations of PP 35-41 and P 43. For the reasons next set out, that portion of GMAC's motion is granted in its entirety.

Wesley's contentions are bizarre indeed. If GMAC does systematically overstate end-of-term residual values, as Wesley's counsel urge, that practice would increase the chances that the residual value will exceed the wholesale price actually brought by the vehicle. Lease P 12(c)(ii) guarantees that early-terminating lessees will be credited with the greater of those two figures, so that consumers should generally benefit from the practice (GMAC Motion To Dismiss 4). Wholesale auction prices that fall short of the allegedly overinflated residual value estimates can never be used in calculating termination liability. In such cases the residual value figure (a higher number) must be deducted from the lessee's debt to GMAC.

Federal Reserve staff commentary to Regulation M authorizes the use of either whole-sale or retail value as a means of calculating value at termination, "provided that choice is consistent with the lessor's general practice or intention when determining the value of the property at the end of the lease term" (Reg. M. Commentary s 213.4(d) P 4). Thus the use of wholesale prices is explicitly approved of by the agency charged with issuing interpretive regulations under the Act, so long as the requirement of consistency is met (Kedziora, 780 F.Supp. at 526).

Yet for the reasons just discussed, any inconsistency between GMAC's use of wholesale value at early termination and its use of residual value upon scheduled termination can only cut in the consumer's favor. Wholesale value may be applied in the calculation of early termination charges only when it exceeds estimated residual value. Any shortfall in the wholesale price will trigger the deduction of the higher residual value from the lessee's termination charges.

Likewise, the appraisal mechanism gives consumers an opportunity to challenge the use of the value attributed to the vehicle by GMAC. That mechanism does indeed protect consumers against efforts to undervalue their cars. For the rational consumer will call the mechanism into play only when GMAC realizes a wholesale auction value that exceeds the residual value,[7] but exceeds it by less than the differential that true market prices would reflect.

Wesley's suggestion that GMAC should be obligated instead to pick residual value off a graph that plots expected depreciation against time is rejected here for the same reason that the identical suggestion was rejected in Kedziora, 780 F.Supp. at 527. Such a practice would guarantee the facial consistency demanded by Wesley Mem. 3-4, but only by denying the consumer any possible benefit from a sale price that exceeds estimated residual value.

Thus the aspects of the termination formula challenged in PP 35-41 and P 43 can cause the consumer no injury. They cannot trigger the imposition of "unreasonable" penalties or form the basis of a nondisclosure claim.[8]

Disposition Charge

Lease P 12(c)(ii) also authorizes GMAC to assess against the early-terminating lessee any "reasonable costs of preparing the vehicle for sale and selling it." Wesley characterizes that disposition charge ($175 in her case) as an unreasonable penalty because no comparable charges are imposed upon the lessee who retains his or her vehicle for the full Lease term, although

---

7 Once more: GMAC cannot use the wholesale auction value if it is less than the estimated residual value.

8 What has been said here suggests that Wesley's counsel, demonstrating an apparent inability to read the straightforward language of Lease P 12(c)(ii), have advanced an argument that runs directly counter to their clients' economic welfare. That scarcely speaks well for their satisfaction of the adequacy-of-representation factor that is one of the Rule 23(a) prerequisites to a class action. Unfortunately this is not the first time that this Court has had occasion to identify deficiencies on the part of Wesley's counsel (see its Mar. 24, 1992 opinion, 1992 67865, 1992 U.S.Dist. LEXIS 4998).

GMAC obviously incurs costs when it disposes of a vehicle under those circumstances as well (P 42).

GMAC counters that the charge is reasonable because it merely captures the real costs imposed by early termination. GMAC further reads Kedziora, 780 F.Supp. at 526 to authorize the imposition of disposition charges so long as they are not double-counted—that is, deducted from the resale value with which the lessee is credited and then assessed a second time as an independent charge.

Wesley has the better of the argument. Kedziora, id. emphasized that when identical disposition charges are assessed against both early terminators and those who carry their leases to term (as was true in that case but not in this one), then "the charge is not really an early termination penalty as such, and it therefore is not properly considered under Section 1667b(b)." That opinion did not issue blanket approval to disposition charges so long as they are not double-counted. Nor did the opinion construe Regulation M or its official staff commentary as authorizing the use of disposition charges against lessees who terminate early but not those who fulfill their lease terms.

In short, Kedziora neither Confronted the factual situation described here nor laid down a legal rule broad enough to cover this situation.[9] But in its discussion of the use of the Rule of 78's by Citicorp, Kedziora, 780 F.Supp. at 525 did state a principle for deciding the validity of any charges that supposedly capture costs unique to early termination: GMAC as the moving party must show that "early termination inflicts particular costs upon the lender that are captured within a reasonable margin of error by use of [the disposition charge]." Otherwise such a charge does indeed appear to be a penalty rather than an attempt to capture the same value provided by a lessee who retains his or her vehicle for the duration of the lease, but is not assessed a disposition charge.

---

9 One pitfall of arguing about the meaning of an earlier opinion before the judge who authored it is that the judge is necessarily the arbiter of what he or she meant by any disputed portions of that opinion. C'est la vie, GMAC.

GMAC has not met its burden here. Hence any charges of "unreasonableness" predicated on P 42 must survive the motion to dismiss. This is the only allegation of Count I left standing

Classwide Disclosure Claims

Wesley charges that the GMAC Lease as a whole does not satisfy the statutory requirement of clear and conspicuous disclosure of relevant terms (P 45). Specifically, she charges that the terms "Rule of 78's" and "sum of the monthly balances" are not reasonably understandable by the average consumer and thus violate the Act's disclosure requirements (p 46). She adds that GMAC 'could have disclosed' specific early termination figures or a month-by-month list of figures "from which the amount realized by selling the car is to be subtracted" (P 47).

Wesley also claims that the disclosure of "unreasonable" penalties is in itself a violation of the Act's disclosure requirements, because it leads the consumer to believe that GMAC can collect more than it is legally entitled to collect (P 48). She adds that the placement of certain disclosures on the back of the Lease form violate the requirements of Regulation M and the staff commentary thereto. Similarly, P 54(b) repeats the general charge that the form Lease provides inadequate disclosures, while PP 61-64 also repeat like charges.

GMAC contends (its Mem. 5) and Wesley concedes (her Mem. 5-7) that each of those allegations corresponds to a virtually identical allegation stricken in Kedziora for failure to state a claim. That contention and concession apply both to allegations stricken in the written Kedziora opinion and to the theories rejected in this Court's later oral denial of a motion to reconsider in Kedziora.[10] Therefore all allegations of the Complaint charging inadequate disclosure that are predicated upon PP 45-49, 54(b) and PP 61-64 are stricken. Counts II and III are dismissed in their entirety.

---

10 It was in that motion that Kedzioras' counsel (who are also Wesley's lawyers) first offered the theory that the description of unreasonable lease terms constituted a disclosure violation—a theory that this Court rejected there and again rejects here.

Individual Disclosure Violation

Next PP 50(a) and 66(a) allege that Wesley's Lease failed to disclose her purchase of an extended warranty. Her lease does contain the handwritten terms "Alarm System—Warranty" within a box captioned, "Describe major items of additional equipment and any service contracts, extended warranties, or mechanical repair insurance" (Ex. A). GMAC contends that cryptic description is sufficient as a matter of law to satisfy the Reg. M s 213.4(g)(7) requirement that all express warranties be identified. In support of that position GMAC cites the staff commentary's statement that such identifications "may be brief" (Reg. M Commentary s 213.4(g)(7) P 1).

This Court too appreciates brevity, though that might not be apparent from some of its opinions. But though it may be true among other things that "[b]revity is the soul of wit,"[11] neither wit nor brevity is itself the standard for adequate disclosure. This Court agrees with Wesley that the brief description "Alarm System—Warranty" is (to say the least) not so plain-meaning a term as to compel dismissal on a Rule 12(b)(6) motion. It would have been a simple enough matter to write within the allotted space a few more words that would have eliminated any possibility of misunderstanding.

This aspect of the Complaint, which is contained within Count IV, thus survives the motion to dismiss. Because GMAC has not challenged the additional allegations raised by P 66(b), the only other element of that count, all of Count IV survives.

State-Law Violations

In PP 68-75 Wesley reiterates all that has come before in her Complaint, then charges that the default and early termination charges imposed by GMAC constitute both unenforceable penalties under Illinois law (P 69)—apparently a commonlaw claim—and violations of the CFA (P 72-73). Both those claims require little discussion.

---

11 William Shakespeare, *Hamlet* act 2, sc. 2, line 90.

As for the first of them, Kedziora, 780 F.Supp. at 532 plainly held that the Act incorporates the common-law definition of an unenforceable penalty. Therefore no claim of an unenforceable penalty under state law can survive if the same claim has been stricken when raised in the federal-law context. Accordingly only the claim as to the disposition charge remains alive and kicking in Count V.

Likewise, Kedziora, id. at 534 (citation omitted) construed the CFA to require a showing that GMAC's leases are both "unfair" and "deceptive," with the latter term construed to mean "that the acts and practices were capable of being interpreted in a misleading way." This Court adheres to its view expressed in Kedziora that conduct that is "reasonable" under the federal law directly designed to regulate it does not violate the more nebulous and far-reaching provisions of Illinois law. Count VI of Wesley's Complaint survives only insofar as it relates to the disposition charge.

Conclusion

In summary, GMAC's motion to dismiss is granted except as to (1) the allegation of Count I found in its P 42, (2) Count IV in its entirety and (3) the portions of Counts V and VI that assert state-law claims corresponding to Count I P 42. GMAC is ordered to answer, on or before October 16, 1992, the surviving portions of the Complaint to which it has not already provided an answer, and then counsel for the parties are directed to appear at a status hearing at 9 a.m. on October 23, 1992. At that time they should be prepared to discuss, among other issues, the possibility that some form of additional notice should be provided to class members in light of this opinion.

IN THE

CIRCUIT COURT OF COOK COUNTY, ILLINOIS

COUNTY DEPARTMENT, LAW DIVISION

91 L 11124

BLANK and CORONE,

Plaintiffs,

—v.—

SUN HYUNDAI, et al.,

Defendants.

ORDER

This matter coming before the court on the motion of the defendants to dismiss, and the Court having reviewed extensive briefs and heard oral argument, IT IS HEREBY ORDERED, for the reasons stated in the open Court:

1. The Court strikes paragraph 36 of the amended complaint, dealing with the cost of disposition, for failure to allege sufficient facts. Plaintiffs are given leave to amend.

2. The Court strikes paragraphs 37 to 43 of the amended complaint, dealing with the wholesale disposition of vehicles upon early termination, for failure to allege facts showing that the end-of-term valuation of the plaintiffs' vehicles is not actually a wholesale value, and thus not consistent with the valuation of the vehicles on early termination. Plaintiffs are given leave to amend.

3. The Court otherwise denies the motion to dismiss plaintiffs' allegations that the early termination charges are unreasonable, in violation of 15 U.S.C. 1667b(b).

4. The Court strikes paragraph 45 of the amended complaint, dealing with excess mileage charges, for failure to allege sufficient facts. Plaintiffs are not given leave to amend.

5. The Court strikes, without leave to amend, paragraphs 49-51, alleging that references to the "constant yield method" of determining depreciation and related to terms violate the Truth in Leasing Act and Regulation M. The Court holds that the use of such terms complies with Regulation M's requirement that the "method" of determining termination or default charges be disclosed.

6. The Court strikes, without leave to amend, paragraph 52 of the amended complaint, alleging that the specification of excessive termination charges is a disclosure violation, for the reasons stated in open Court.

7. The Court strikes, without leave to amend, paragraphs 53-54 of the amended complaint, alleging that disclosures are made below the signature line.

8. The Court denies defendants' motions to dismiss the claim in paragraph 55 of the amended complaint that the disclosure of default charges in the General Electric Credit Auto Lease form is confusing.

9. With respect to the claim in paragraphs 56-59 of the amended complaint that the warranty disclosures are inadequate, the Court denies the motion to dismiss because of the first sentence of the warranty disclosure in the General Electric Credit Auto Lease form, but finds that the second sentence would not independently constitute a violation of the Consumer Leasing Act.

10. Count III of the amended complaint, alleging that the early termination and default charges are unenforceable penalties under state law, is dismissed to the extent Count I is dismissed and may stand to the extent Count I stands.

11. With respect to defendants' motion to dismiss plaintiffs' claims under the Illinois Consumer Fraud Act (Count IV), the Court:

a. Holds that a claim may not be brought under the Consumer Fraud Act for unfairness as opposed to deceptive statements or omissions.

b. Rejects defendants' contention that leases of automobiles are not subject to the Consumer Fraud Act.

c. Holds that the Consumer Fraud Act may not be used to challenge disclosures which comply with specific requirements of the Truth in Leasing Act and Regulation M (the use of "constant yield method").

d. Requires plaintiff to replead the Consumer Fraud Act claim, consistent with the above rulings, and setting forth in the Consumer Fraud Act claim, rather than simply through incorporation by reference of the entire Truth in Leasing Act claim, of the specific acts and practices alleged to violate the Consumer Fraud Act.

12. The Court takes under advisement the issue of whether General Electric Credit Corporation can be liable under the Consumer Fraud Act for acts of its subsidiary General Electric Credit Auto Lease under a theory other than "piercing the corporate veil" and will issue a ruling.

13. Plaintiffs are given 35 days to file a second amended complaint in each case.

14. Plaintiffs shall, in the interests of simplifying the pleadings, not include the allegations that have been stricken without leave to amend in their second amended complaints, and shall not waive their rights with respect to the Court's rulings by doing so.

15. Defendants in each case shall have 28 days thereafter to file a responsive pleading or motion. Defendants in Mortimer are not required to respond further to the first amended complaint.

ENTER:

/s/ PADDY H. MCNAMARA
Hon. Paddy H. McNamara

July 6, 1992

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

92-9288
92-9362

June 11, 1993

BETTY LUNDQUIST, on behalf of herself and all others similarly situated,

Plaintiff-Appellant-Cross-Appellee,

—v.—

SECURITY PACIFIC AUTOMOTIVE FINANCIAL SERVICES CORPORATION,

Defendant-Appellee-Cross-Appellant.

AFFIDAVIT OF J. DAVID FREEMAN IN SUPPORT OF PETITION OF SECURITY PACIFIC AUTOMOTIVE FINANCIAL SERVICES CORPORATION

STATE OF CALIFORNIA :
: ss.
COUNTY OF SAN DIEGO :

J. DAVID FREEMAN, being duly sworn, deposes and says:

1. I am the President of Security Pacific Automotive Financial Services Corporation. I submit this affidavit in support of its Petition for Rehearing with Suggestion of Rehearing *in banc*. I do so because of the enormous impact upon my com-

pany and upon the automotive finance industry threatened by the ruling dated May 6, 1993 by a Panel of this honorable Court.

2. That ruling held that the early termination clause contained in Paragraph 16(c) of our standard automotive lease form did not satisfy the disclosure requirements of the Consumer Leasing Act, 15 U.S.C. §§ 1667, *et seq.*, and Regulation M promulgated by the Federal Reserve Board thereunder. In its three-sentence invalidation of that clause, the opinion threatens to wreak havoc in the industry.

3. The language is a standard disclosure contained in some eleven thousand of our active leases. Upon information and belief, the language of the clause, or an indistinguishable counterpart, is to be found in the vast majority of all consumer automotive leases in the country. According to "Vehicle Leasing Today," there were 1.3 million passenger cars leased in 1992 alone. Hence, this six-line portion of the panel's ruling has called into question an important provision of probably 1 million existing auto leases. I would hope that this fact alone would convince the Court that the question is worth a second look.

4. The reason the provision is so common is because it is fair to both sides of the transaction. When a consumer decides to terminate his lease prior to the termination date or when the company must terminate because of default, the calculation described by this clause must be made, which, in a nutshell, calculates the depreciated value of the car versus its realized value.

5. Over the past years, various methods have been used to calculate the proportion of the lease payments attributable to depreciation. These include the "sum of the digits," the "Rule of the 78's," the "sum of the monthly payments" and the "constant yield method." The last-mentioned is the one approved in Statement of Financial Accounting Standards No. 13, and is one referred to by name in our lease. It is the fairest to the consumer because it does not distort the calculation of depreciation, as do some of these other methods.

6. However, the constant yield method (and any other method of depreciation) involves calculations which are somewhat complex. We believe this is why the Consumer Leasing Act and Regulation M both permit disclosure of the amount "or the method" of calculation. We have done so by identifying the constant yield method and, indeed, have gone further and explained accurately how the method works.

7. Further, other numbers disclosed in the lease allow the consumer to calculate in his head the approximate amount of depreciation attributable to his car with excellent accuracy.

8. Early termination, either voluntary or involuntary, is relatively common and occurs in approximately 35% percent of our leases. If this clause is invalidated, neither the dealers nor the consumers will know what should occur in the event of an early termination. Further, the panel's opinion provides no guidance whatsoever to our draftsmen. Because the Panel did not say why the clause was confusing, we have no idea how to draft these provisions in the future.

9. Accordingly, for the reasons set forth above, I respectfully urge the Court to grant a rehearing *in banc* and to reverse the Panel's decision.

/s/ J. DAVID FREEMAN
J. David Freeman

Subscribed and sworn to before me this 9th day of June, 1993.

/s/ MEGAN S. HART
Notary Public

MEGAN S. HART
Notary Public–California
SAN DIEGO COUNTY
My Commission expires
September 21, 1993

Supreme Court, U.S.
FILED
SEP 28 1993
OFFICE OF THE CLERK

No. 93-326

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

SECURITY PACIFIC AUTOMOTIVE FINANCIAL SERVICES CORP.,

Petitioner,

-v.-

BETTY LUNDQUIST, on behalf of herself and all others similarly situated,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE; and BRIEF OF AMICUS CURIAE NATIONAL VEHICLE LEASING ASSOCIATION IN SUPPORT OF THE PETITION OF SECURITY PACIFIC AUTOMOTIVE FINANCIAL SERVICES CORP. FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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BEST AVAILABLE COPY

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION OF NATIONAL VEHICLE LEASING ASSOCIATION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

The National Vehicle Leasing Association (the "Association") respectively moves this Court for leave to file a brief amicus curiae in support of the petition of Security Pacific Automobile Financial

Services Corp. ("Security Pacific") for a writ of certiorari in the above-captioned matter. The consent of Security Pacific has been obtained, and the consent of Respondent was requested, but refused.

The interest of the Association arises from the fact that the Association is a trade association representing members of the vehicle leasing industry, and industries providing services to the vehicle leasing industry, with in excess of 450 members located throughout the nation. The Association's members have leased in excess of 5,000,000 vehicles to individuals and businesses throughout the country. The Association's member lessors located within the Second Circuit will be negatively impacted if the opinion of the Second Circuit is not reversed. Accord-

ingly, the Association is vitally interested in this matter.

The Association, as a representative of a large segment of the vehicle leasing industry, is thoroughly familiar with leasing issues. It is the Association's intent in submitting a brief amicus curiae to address several matters which were not addressed by the Second Circuit in its decision. These issues relate both to what the Association believes was an incorrect application of the relevant law as well as the failure of the Second Circuit to consider the necessary ramifications of its decision.

Of particular relevance is the Second Circuit's apparent failure to consider the potential negative impact on consumers which this decision will create. As will be more fully explained in the brief, the

methodology of calculating lessee's early termination lease balance liability contained in the Security Pacific lease is eminently fair both to lessors and lessees. Any simpler format, which is what the panel may contemplate, will of necessity result in a formula which will have arbitrary results and presumably increase the overall liability of consumers, or alternatively, expose lessors to loss. Neither such result is mandated under the lease at issue.

For the above reasons, the Association respectively requests that this motion be granted and that the Association

be granted leave to file the following brief amicus curiae.

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Attorneys for
Amicus Curiae

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INTRODUCTION, AND INTEREST OF THE ASSOCIATION

This amicus curiae brief is submitted on behalf of the National Vehicle Leasing Association (the "Association") in support of the petition of Security Pacific Automotive Financial Service Corp. ("Security Pacific") for a writ of certiorari to the United States Court of Appeals for the Second Circuit. The Association is a nationwide trade association with in excess of 450 members engaged in vehicle leasing and providing services to the vehicle leasing industry. The Association's members have leased in excess of 5,000,000 vehicles to consumers and businesses nationally, with the majority of those leases being to consumers. The Association is the only national trade association whose principal focus is the interests of vehicle lessors leasing to consumers.

This brief is directed to the portion of the Second Circuit decision relating to the language in the early termination provision of the Security Pacific lease which deals with the preservation of Security Pacific's "book position." Like the substantial majority of consumer vehicle leases, the Security Pacific lease provides that upon early termination the lessee is responsible for the sum of:

> (1) all past due payments and any other amounts due because of a default; plus
>
> (2) the lessor's book position in the lease; less
>
> (3) the amount realized through disposition of the vehicle.

And, as with the substantial majority of leases which calculate a lessee's early termination liability with reference to the lessor's book position, the book position is calculated with reference to that

portion of FASB 13 which relates to "direct financing leases." The language Security Pacific utilizes to describe the FASB 13 lease writedown methodology is fairly typical of leases of this type.

In reviewing the Security Pacific lease, the Second Circuit noted its agreement with the trial court that the "disclosures are not readily understandable" and went on to state that "the termination formula in Item 16(c) of the lease is a Byzantine formula, beyond the understanding of the average consumer." This wholly conclusory analysis leaves the lessor community in a complete quandary as to what may be permissible in the context of consumer vehicle leasing. Specifically, the Second Circuit decision could be read as saying that:

(1) The disclosures contained in paragraph 16 of the Security Pacific lease are inadequate,

(2) The actuarial writedown methodology contemplated was inappropriate, or

(3) Neither the disclosure nor an actuarial writedown are appropriate.

The Second Circuit decision gives lessors no guidance on how to fulfill their legal duties, and in light of the tremendous growth of consumer vehicle leasing and the pervasive usage of the FASB 13 writedown methodology, it is highly inappropriate that lessors should be forced to operate in the environment of uncertainty created by the Second Circuit decision.

The Second Circuit decision may rest on the proposition that disclosure of a lease writedown method (the mechanics of which the average consumer will not understand, whether or not adequately disclosed) violates the Consumer Leasing Act. If so, the decision runs directly contrary

to the clear trend of case law, the apparent thinking of the Federal Reserve Board, the clear language of Regulation M and the reality of an electronically-based financial world. The decision should be reviewed by this Court.

The Financial Accounting Standards Board Standard No. 13 ("FASB 13") writedown methodology (i.e., the method used in the lease for determining the lessee's depreciation credit for purposes of calculating the lessee's early termination liability) employed in the Security Pacific lease is an actuarial method writedown system employed in the substantial majority of consumer leases written nationally. The same considerations which have caused commentators to approve the actuarial writedown method, together with the provisions of Section 183(b) of the Consumer Leasing Act, 15 U.S.C. § 1667b(b) ("Section 183(b)") have led lessors to adopt

the FASB 13 system. Under the Second Circuit decision, it is impossible to ascertain whether the Court finds fault with the actuarial method (i.e., is that the "Byzantine formula?") or the means of its expression.

The uncertainty created by the Second Circuit decision may cause lessors to forsake the fairness of the FASB 13 actuarial-type methodology for a numerically-driven formula which will inevitably result in an early termination charge lacking the inherent fairness, from the perspective of either the lessor or lessee, of the actuarial writedown which by definition preserves the implicit yield in the transaction. This is clearly inappropriate from a policy perspective.

ARGUMENT

I. THE LEASE ADEQUATELY DESCRIBES THE WRITEDOWN METHODOLOGY UNDER CURRENT LAW.

Paragraph 8 of the Security Pacific lease, which describes the writedown methodology to be employed, reads as follows:

> 8. ALLOCATION OF MONTHLY LEASE PAYMENTS
>
> Portions of each monthly lease payment are for depreciation, lease charge and sales/use tax. While the total amount of each monthly lease payment will be the same (assuming that current sales/use tax rates, if applicable, do not change), the depreciation and lease charge portions will differ with each payment. During the lease term you will earn a total of lease charges equal to the product of the number of monthly lease payments, due under the lease times $\underline{\$102.24}$, the average monthly lease charge. The lease charges will be earned by you on a constant yield basis in relation to the Adjusted Lease Balance as it declines during the lease term. The lease charge portion for any monthly lease payment is figured by multiplying the rate which provides a constant yield throughout the lease term times the Adjusted

> Lease Balance. Again, the portion of the monthly payment not allocated to lease charges or sales/use tax will be allocated to depreciation. (These calculations will follow the rule for journal entries for lessors as to direct financing leases obtained in Statement of Financial Accounting Standards No. 13.)
>
> At any given time the Adjusted Lease Balance is:
>
> (a) $18,780.00 less (b) the sum of (1) all depreciation amounts received by you to date plus (2) One Base Payment, Item 3.A.

This disclosure tells the consumer two salient facts: first, that the writedown will be done in accordance with constant yield method as implemented by FASB-13; and second, how the writedown system works from a conceptual perspective. Absent are only the actual mathematical formulas, of which more will be mentioned below.

Regulation M requires disclosure of the "method of determining the amount of any . . . charge for early termination."

12 C.F.R. § 213.4(g)(10). The Security Pacific lease clearly states that FASB 13 will be the method used. The question then becomes whether reference to a method is adequate, or whether the "method" contemplated in 12 CFR § 213.4(g)(10) contemplates something other than an indication of the method, such as the specifics of the method, including its mathematical formula or formulae.

The Federal Reserve Board in addressing this issue in an analogous setting noted:

> Many state statutes provide for rebates of unearned finance under methods known as the "Rule of 78's" or "sum of the digits" or other methods. In view of the fact that such statutory provisions involve complex mathematical descriptions which generally cannot be condensed into simple, accurate statements, and which if repeated at length on disclosure forms could detract from other important disclosures, the requirement of rebate "identification" is satisfied simply by reference by name to

> the "Rule of 78's" or other method, as applicable.

Regulation Z Commentary § 226.818(c) (emphasis added). Although Regulation Z has been rescinded, Regulation Z was the predecessor to Regulation M and its logic is compelling and validates the reference to FASB 13 in the Security Pacific lease.

In fact, a reference to the Rule of 78's, another rebate method used by some lessors, was recently found adequate in Kedziora v. Citicorp National Services, Inc., 780 F.Supp. 516, 530 (N.D.Ill. 1991). The Kedziora decision is particularly instructive in part because of its analysis and in part because of the conceptual similarity of the facts there to the facts at hand.

The lease at issue in Kedziora provided that a Rule of 78's writedown methodology was to be employed in calculating the early termination lease balance. The

plaintiff argued, among other things, that "the disclosures of early termination liability are generally hard for the average consumer to understand" and that reference to a method alone was inadequate. Kedziora, 780 F.Supp. at 529-30. The court held that the disclosure was adequate under the law even if it was generally difficult for consumers to understand.

First, the court concluded that "more" was not necessarily "better:"

> There is no avoiding the fact that a lease must contain a lot of information, much of it technical, legal or mathematical. Not all such information can be conveyed in terse everyday language. Perhaps the Lease at issue here could be made clearer if it were made longer -- if every cross-reference were replaced by repetition of the matter covered, and if every significant term and contingency were spelled out in detail. But the Act certainly does not require the lessor to take such steps, and no doubt if the lessor did some plaintiffs' attorney would argue (with justifica-

> tion) that the lessor had burdened the consumer with "informational overload"....

Kedziora, 780 F.Supp. at 529.

Second, the court noted that the purpose of disclosures under the Act, which is to remedy abuses resulting from consumer ignorance of the nature of credit arrangements and to enable consumers to shop for credit by comparing uniform terms, would not be better satisfied if the lease had contained a description of the operation of the Rule of 78's or of the actuarial method. Such a description, the court said, would not put the consumer in a better position to shop for credit, and, in fact, "[w]hat might pass for technical full disclosure would in practice substitute obfuscation for the summary that is afforded to Citicorp's lessees." Kedziora, 780 F.Supp. at 530.

Finally, the court stated that Regulation M specifically permits disclosure of "methods or amounts." Id.

Essentially the Kedziora court concluded that the lessors should be allowed to utilize the same types of writedown methodologies as creditors and that a general description of the methodology employed was adequate, since a full-blown explanation was likely to be so confusing as to be meaningless. The Federal Reserve Board's explanation of the actuarial system as discussed below, is functionally identical to the FASB 13 writedown methodology. Given the contents of the explanation, it is clear how the Kedziora court might have reached its conclusion.

The plain language of Regulation M, the Federal Reserve Board Commentary and the Kedziora decision dictate that a reference to FASB 13, such as the reference found in paragraph 8 of the Security Pa-

cific lease, is adequate. The remainder of paragraph 8 of the Security Pacific lease falls into its proper context as additional information allowed to be included pursuant to 12 C.F.R. § 213.4(b). Focusing on the lessor's calculations and substituting $5,000 for the $18,870 figure and 1.003% for the appropriate level yield return applicable in Ms. Lundquist's lease, it is clear that this additional information correctly describes in generic terms how FASB 13 works without introducing the actual mathematics.

II. THE ACTUARIAL WRITEDOWN METHOD USED IN THE SECURITY PACIFIC LEASE IS FAIR WHETHER OR NOT IT IS READILY UNDERSTANDABLE BY THE AVERAGE CONSUMER.

The "byzantine" nature of an actuarial writedown method should not be an issue in a disclosure matter. Courts have long recognized that consumers may not understand how an actuarial or Rule of 78's

writedown method works, see, e.g., Kedziora, 780 F.Supp. 516, Drennan v. Security Pacific National Bank, 28 Cal.3d 764, 772, 170 Cal.Rptr. 904, 908 (1981), but have nevertheless upheld the disclosure where there is a reference to the method employed. In the case of consumer leases this is particularly appropriate because of the "safety net" effect of Section 183(b).

Section 183(b) requires that charges imposed in relation to a default or other early termination must be reasonable in light of the particular circumstances. The prohibition against the imposition of unreasonable charges is the "safety net" of Section 183(b). The constant yield or FASB 13 writedown, which is an actuarial type writedown method, clearly satisfies the requirement of Section 183(b) by protecting the implicit yield in the transac-

tion.[1] In fact, the constant yield approach is more than fair to consumers because the lessor's true yield will always be less than had the transaction gone to term and the lessor's set-up costs been fully amortized.

Expressed alternatively, if lessors are not to be foreclosed from usage of electronic means of establishing lessees' early termination liability which focus on return on investment, preservation of yield and the like, lessors must be allowed to disclose the lessee's liability with reference to an actuarial type (i.e., actuarial, United States Method, FASB 13)

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1 The implicit yield is the simple interest return on investment the lessor would receive if the lease went to full term, all payments were timely made and the lessor recovered the lessor's estimated residual assumption at lease end. FASB 13 results in the same return at early termination. This is not to say that other approaches may not also satisfy Section 183(b) in the context of the particular lease.

or other writedown method. It must then be taken as a given that some consumers will not understand the precise calculation and that a full-blown disclosure of how it works will do nothing to advance that understanding and will probably cause claims of "informational overload" in violation of the Supreme Court's mandate in Ford Motor Credit Co. v. Milhollin 444 U.S. 555, 568 (1980). See also Kedziora, 780 F. Supp. at 529. Section 183(b) performs the remedial function of allowing current financial reality to operate in a fashion which protects the legitimate and substantive interests of all concerned.

The alternative is to require lessors to specify mathematical formulas in their leases. This approach is potentially unfair to one party or the other, will encourage significant Section 183(b) litigation, will require lessors to maintain separate lease accounting and lessee bal-

ance systems and will not enhance substantially the meaningfulness of lease disclosures. Adoption of this approach also leads to the conclusion that Congress intended that the use of modern financial systems be restricted to creditors, and not to lessors. It is inconceivable that Congress anticipated such a result when passing the Consumer Leasing Act.

III. THE SECOND CIRCUIT DECISION HAS CAUSED CONFUSION IN THE LEASING COMMUNITY.

As noted above, in its decision the Second Circuit fails to indicate whether the concern is with the disclosure, and if so, in what regard, or with the fact that the Security Pacific lease uses a formula a consumer may not readily understand. Given the tremendous growth of consumer vehicle leasing, the fairness of the FASB-13 actuarial writedown method and the pervasive usage in the industry of that

writedown methodology, allowing the the Second Circuit decision to stand would disserve lessors and lessees alike. The current summary language in the Second Circuit decision could lead the industry away from a writedown approach which so clearly fosters the legitimate expectations of lessees (and, in fact, as noted above, goes beyond mere equality).

FASB 13 leases have for many years provided lessors a comfort level that their Section 183(b) duties were being fulfilled. Further, lessors have, as have creditors, assumed that reference to the methodology of writedown would be adequate. The leasing industry should not be so cavalierly dissuaded from those assumptions.

In a real sense the Second Circuit was faced with the following policy decisions:

> (1) Consumers may not as a practical matter comprehend writedown or amortization methods that are used in the financial services industry. Does that mean that lessors cannot legally use those methods?
>
> (2) If lessors can use those methods, what forms of disclosure are adequate?

Unfortunately, in dealing with these questions the Second Circuit appears to have ignored the significant body of law which has dealt with the issues before it. The Second Circuit has also failed to explain its holding in a manner which will instruct those seeking to follow its dictates in any meaningful way. This Court should not allow that ambiguity to continue.

CONCLUSION

The Association believes the Second Circuit decision was incorrect from both a legal and policy perspective and should be reversed. However, regardless whether or not the Second Circuit decision was correct, it is clear that the Second Circuit's decision must be clarified. The petition should be granted.

Respectfully submitted,

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